

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3 NORTHERN DIVISION

4 KEITH MATHIS, ET AL,)
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HEARING ON MOTIONS TO DISMISS

OCTOBER 8, 2009

HONORABLE JAMES C. DEVER, III, PRESIDING

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APPEARANCES:

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33
34 SHARON K. KROEGER, COURT REPORTER
35 MACHINE SHORTHAND REPORTER, COMPUTER AIDED TRANSCRIPTION

1 THE COURT: GOOD MORNING AND WELCOME TO THE
2 UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
3 NORTH CAROLINA. WE ARE HERE TODAY IN CONNECTION WITH A
4 MOTIONS HEARING ON TWO PENDING MOTIONS TO DISMISS IN
5 CONNECTION WITH THE MATHIS VERSUS GEO GROUP CASE.

6 THE DEFENDANTS ARE THE BUREAU OF PRISONS AND
7 MR. LAPPIN IN HIS OFFICIAL CAPACITY. THEIR MOTION TO
8 DISMISS IS AT DOCKET ENTRY 64. GEO ALSO FILED A MOTION
9 TO DISMISS AT DOCKET ENTRY 65.

10 THE COURT HAS READ ALL THE MATERIALS THAT HAVE
11 BEEN SUBMITTED.

12 AT THIS TIME, I WOULD ASK PLAINTIFF'S COUNSEL
13 TO INTRODUCE THOSE AT PLAINTIFF'S TABLE, AND THEN I WILL
14 HEAR FROM DEFENSE COUNSEL, AND THEN I WILL HEAR ARGUMENTS
15 ON THE MOTIONS.

16 MR. RIEMANN: YOUR HONOR, I AM NEIL RIEMANN
17 FROM PENRY, RIEMANN HERE IN RALEIGH. WE HAVE THREE FOLKS
18 FROM COVINGTON & BURLING HERE; ONE FROM THE WASHINGTON
19 LAWYERS' COMMITTEE.

20 MR. RIDINGS: GOOD MORNING.

21 MR. HERMAN: GOOD MORNING.

22 MS. SCHATTSCHEIDER: GOOD MORNING.

23 MR. RIEMANN: DONALD RIDINGS AND ANTHONY
24 HERMAN FROM COVINGTON & BURLING; LAURA SCHATTSCHEIDER
25 FROM COVINGTON & BURLING. AND DEBORAH GOLDEN.

1 THE COURT: GOOD MORNING.

2 MR. RIEMANN: I BELIEVE MR. RIDINGS IS GOING
3 TO START THE ARGUMENT, AND MS. SCHATTSCHNEIDER IS GOING
4 TO ASSIST HIM WITH THAT.

5 THE COURT: THANK YOU. I LOOK FORWARD TO
6 THAT.

7 AND FROM THE DEFENSE?

8 MR. NUMBERS: GOOD MORNING, YOUR HONOR. I AM
9 ROBERT NUMBERS HERE ON BEHALF OF GEO.

10 THE COURT: GOOD MORNING.

11 MS. WYER: YOUR HONOR, KATHRYN WYER ON BEHALF
12 OF THE BUREAU OF PRISONS AND MR. LAPPIN.

13 THE COURT: GOOD MORNING.

14 MS. WYER: GOOD MORNING.

15 THE COURT: AGAIN, I HAVE READ EVERYTHING THAT
16 HAS BEEN SUBMITTED AND I WILL HEAR FIRST FROM THE BUREAU
17 OF PRISONS AND MR. LAPPIN, AND THEN I WILL HEAR FROM MR.
18 NUMBERS ON BEHALF OF GEO.

19 MS. WYER: SHOULD I MOVE TO THE MIDDLE?

20 THE COURT: WHICHEVER YOU PREFER.

21 MS. WYER: I WILL STAY WITH THE MICROPHONE.

22 THERE IS ONE REMAINING PLAINTIFF IN THIS CASE
23 AND HE HAS FAILED TO RAISE VIABLE EIGHTH AMENDMENT OR
24 SECTION 504 OF THE REHABILITATION ACT CLAIMS AGAINST THE
25 FEDERAL DEFENDANTS BASED ON ACTIVITIES THAT TOOK PLACE IN

1 A PRIVATELY OWNED AND PRIVATELY OPERATED FACILITY.

2 THE COURT: ON THE EIGHTH AMENDMENT CLAIM, DO
3 YOU CONTEND THAT MALESKO AND HOLLY VS. SCOTT CONTROL?

4 MS. WYER: YES, WE DO, YOUR HONOR.

5 THE COURT: OKAY. AS PART OF THE REASON, I
6 KNOW THERE IS SOME DISCUSSION IN THE PAPERS ABOUT THAT
7 BECAUSE PLAINTIFF ONLY SEEKS INJUNCTIVE RELIEF SOMEHOW
8 THIS CASE IS OUTSIDE THE SCOPE OF HOLLY VS. SCOTT.
9 HOLLY, OF COURSE, WAS A CASE IN OUR DISTRICT. A
10 COLLEAGUE HANDLED THAT CASE. BUT MR. SCOTT ACTUALLY
11 SOUGHT NOT ONLY DAMAGES BUT AN INJUNCTION, IF YOU
12 ACTUALLY LOOK AT HIS COMPLAINT.

13 SO IT'S YOUR POSITION THAT BASICALLY THERE IS
14 NO GOVERNMENT ACTION BECAUSE GEO IS NOT A GOVERNMENT
15 ACTOR IN ACCORDANCE WITH THE PANEL MAJORITY IN HOLLY?

16 MS. WYER: CORRECT. THE HOLLY COURT CLEARLY
17 ADDRESSED THAT ISSUE WHETHER OR NOT THE MEDICAL CARE AT
18 RIVERS WAS GOVERNMENT ACTION AND HELD THAT IT WAS NOT A
19 PUBLIC FUNCTION.

20 THE HOLLY COURT'S HOLDING THAT THE PROVISION
21 OF MEDICAL CARE AT RIVERS WHICH IS THE VERY SAME ACTIVITY
22 HERE IN THE VERY SAME INSTITUTION, THAT THAT IS NOT A
23 PUBLIC FUNCTION AND THEREFORE THAT IS NOT GOVERNMENT
24 ACTION AND THAT HOLDING IS CONTROLLING IN THIS CASE. AND
25 THE CONCLUSION THAT THERE IS NO GOVERNMENT ACTION AT

1 ISSUE AND THEREFORE THERE CAN BE NO EIGHTH AMENDMENT
2 VIOLATION.

3 THE COURT: OKAY.

4 ALL RIGHT. DO YOU TAKE THE POSITION THAT EVEN
5 IF -- I KNOW YOU MAKE AN ARGUMENT IN YOUR PAPERS ABOUT
6 THE PLRA ON THE REHABILITATION ACT CLAIM.

7 DO YOU TAKE THE POSITION THAT IF THE EIGHTH
8 AMENDMENT CLAIM IS Viable, THAT PLAINTIFF HAS FAILED TO
9 EXHAUST, OR DO YOU BELIEVE HE HAS EXHAUSTED AN EIGHTH
10 AMENDMENT CLAIM UNDER THE PLRA?

11 MS. WYER: WITH RESPECT TO THE EIGHTH
12 AMENDMENT CLAIM, THE ADMINISTRATIVE REMEDIES THAT ARE
13 AVAILABLE ARE AVAILABLE AT RIVERS, SO THE FEDERAL
14 DEFENDANTS HAVE NOT MADE AN ARGUMENT ABOUT EXHAUSTION.
15 SO THE EXHAUSTION ARGUMENT APPLIES TO THE REHABILITATION
16 ACT CLAIM BECAUSE THAT IS WHERE THE DEPARTMENT OF JUSTICE
17 DOES PROVIDE AN ADMINISTRATIVE REMEDY THROUGH THE DOT
18 REGULATIONS.

19 THE COURT: ANYTHING ELSE ON THE EIGHTH
20 AMENDMENT ISSUE?

21 I AM OBVIOUSLY GOING TO GIVE YOU A CHANCE FOR
22 REBUTTAL.

23 MS. WYER: THAT'S ALL FOR NOW.

24 THE COURT: HOW ABOUT THE REHABILITATION ACT
25 CLAIM?

1 MS. WYER: THE REHABILITATION ACT CLAIM, THERE
2 IS WELL ESTABLISHED PRECEDENT THAT THE COURTS WILL NOT
3 FIND AN IMPLIED RIGHT OF ACTION AGAINST A FEDERAL AGENCY
4 WHERE -- AND THAT THEY WILL NOT FIGHT A RIGHT OF ACTION
5 UNLESS IT IS EXPRESSED IN THE STATUTE BECAUSE THE APA
6 ALREADY SETS FORTH A COURSE OF ACTION AGAINST AGENCIES
7 AND COURTS HAVE HELD THAT BECAUSE OF THAT, THERE IS AN
8 IMPLIED CONGRESSIONAL INTENT NOT TO ALLOW A CLAIM TO
9 PROCEED.

10 THE COURT: TELL ME HOW -- AND I HAVE READ
11 THEN JUDGE BREYER'S OPINION FOR THE EN BANC FIRST
12 CIRCUIT, COUSINS VERSUS SECRETARY OF THE U.S. DEPARTMENT
13 OF TRANSPORTATION THAT WAS CITED IN THE PAPERS. TELL ME
14 HOW AN APA REMEDY WOULD WORK, IN THEORY.

15 I KNOW YOU TAKE THE POSITION THAT BASICALLY
16 THE PLAINTIFF IS SEEKING TO HOLD THE GOVERNMENT LIABLE
17 FOR THE ACTIONS OF ITS CONTRACTOR, AND YOU TAKE THE
18 POSITION THE GOVERNMENT IN THE -- WELL, SINCE THE CLAUSE
19 AT ISSUE WHICH WAS ADDED ACTUALLY IN 1978, IT WASN'T
20 ORIGINALLY IN THE 73 ACT. THE CLAUSE AT ISSUE WAS ADDED
21 IN 1978. YOU TAKE THE POSITION THAT THERE SHOULDN'T BE
22 AN IMPLIED RIGHT OF ACTION.

23 TELL ME HOW THE APA WOULD WORK IN CONNECTION
24 WITH A CLAIM UNDER 29 U.S.C. SECTION 794(A). HOW, AS A
25 PRACTICAL MATTER, WOULD IT WORK?

1 MS. WYER: AS A PRACTICAL MATTER, THE CLAIM
2 COULD NOT BE BROUGHT UNDER 794(A). IT WOULD HAVE TO BE
3 BROUGHT UNDER THE APA AND ARGUED THAT THE AGENCY HAD
4 TAKEN A FINAL AGENCY ACTION THAT CAUSED THE ALLEGED
5 INJURY AND THAT THAT ACTION WAS IN VIOLATION OF 29 U.S.C.
6 794.

7 THE COURT: SO THAT IS BASICALLY -- THAT WOULD
8 HAVE TO BE THE CLAIM THAT WOULD HAVE TO BE PLEADED UNDER
9 THE APA, AND THEN THERE WOULD HAVE TO BE AN ANALYSIS OF
10 WHETHER, IN FACT, THAT WAS A VIABLE CLAIM, AND THEN
11 MAKING A RECORD IN FRONT OF THE AGENCY, THAT THAT WOULD
12 BE HOW YOU WOULD THINK, IF A PLAINTIFF IN MR. CALLAND'S
13 SITUATION WANTED TO PURSUE THAT CLAIM, HE WOULD NEED TO
14 DO THAT.

15 MS. WYER: CORRECT. AND THE EXHAUSTION
16 REQUIREMENT THAT IS AVAILABLE THROUGH THE DOJ WOULD STILL
17 HAVE TO BE MET.

18 THE COURT: OKAY. AND YOU ALSO -- WHAT DO YOU
19 HAVE TO SAY TO PLAINTIFF'S ARGUMENT ABOUT PENA? AND THEY
20 CITE FOUR DISTRICT COURT CASES SUGGESTING THAT, OR
21 ACKNOWLEDGING, I THINK IS A FAIR READING OF PLAINTIFF'S
22 PAPERS, THEY DESCRIBE WHAT HAPPENED IN PENA AND THE
23 REINSTATEMENT OF THE CADET AT THE MERCHANT MARINE
24 ACADEMY, AND THAT THE COURT DIDN'T TAKE ISSUE, THE DOJ
25 APPARENTLY DIDN'T TAKE ISSUE WHEN IT WENT UP TO THE

1 SUPREME COURT WITH THAT PORTION OF THE REMEDY AND PENA
2 DEALT WITH THE SOVEREIGN IMMUNITY ISSUE ON DAMAGES.

3 WHAT DO YOU HAVE TO SAY TO THOSE CASES THAT
4 PLAINTIFF CITES THAT, IN FACT, THERE IS AN IMPLIED RIGHT
5 OF ACTION WHERE SOMEONE IS SEEKING INJUNCTIVE RELIEF?

6 MS. WYER: NO COURT HAS EVER HELD THAT THERE
7 IS AN IMPLIED RIGHT OF ACTION AGAINST A FEDERAL AGENCY
8 UNDER -- FOR INJUNCTIVE RELIEF UNDER 794. THOSE CASES
9 DON'T HOLD THAT. THEY SIMPLY FAIL ADDRESS THE ISSUE
10 BECAUSE THE GOVERNMENT DIDN'T MAKE THAT ARGUMENT
11 RECOGNIZING THAT THERE COULD BE A CLAIM ANYWAY UNDER THE
12 APA AND IT WOULD NOT MAKE A SIGNIFICANT DIFFERENCE
13 BECAUSE IN THOSE CASES THERE WAS NO OTHER ALTERNATIVE
14 REMEDY THAT COULD BE SOUGHT AGAINST ANOTHER PARTY BECAUSE
15 THE ACTION AT ISSUE WAS ACTUALLY TAKEN BY THE FEDERAL
16 GOVERNMENT WHEREAS HERE THAT IS NOT THE CASE.

17 BUT I HAVE FOUND ONE CASE, DOE VERSUS ATTORNEY
18 GENERAL AT 723 F. SUPP. 452 IN THE NORTHERN DISTRICT OF
19 CALIFORNIA THAT HAS HELD THE CONTRARY, THAT THERE IS NO
20 RIGHT OF ACTION AGAINST A FEDERAL AGENCY UNDER SECTION
21 504. AND THAT CASE WAS REVERSED BY A NINTH CIRCUIT CASE
22 THAT GEO CITED IN ITS BRIEF, BUT THEN THAT NINTH CIRCUIT
23 CASE WAS VACATED IN LIGHT OF THE PENA, AND AT THAT POINT
24 THE NINTH CIRCUIT AFFIRMED THE DISTRICT COURT HOLDING
25 THAT THERE WAS NO RIGHT OF ACTION AGAINST A FEDERAL

1 AGENCY.

2 THE COURT: 723 F. SUPP. 452?

3 MS. WYER: YES.

4 THE COURT: OKAY.

5 MS. WYER: AND IT WENT THROUGH AN INTERESTING
6 ANALYSIS OF THE DOJ REGULATIONS WHICH WE HAVE CITED AND
7 CONCLUDED THAT THE ONLY AVAILABLE REMEDY AGAINST A
8 FEDERAL AGENCY BASED ON CONDUCT, BASED ON PROGRAMS OR
9 ACTIVITIES CONDUCTED BY THE AGENCY WAS THROUGH THIS
10 ADMINISTRATIVE MECHANISM.

11 THE COURT: OKAY. AND THEN, BASICALLY YOU
12 TAKE THE POSITION THAT BECAUSE THIS IS A FEDERAL
13 PROCUREMENT CONTRACT, IT'S NOT A PROGRAM OR ACTIVITY
14 CONDUCTED BY AN EXECUTIVE AGENCY; RIGHT?

15 MS. WYER: NOT EXACTLY. WE -- THE DOJ
16 REGULATIONS AT 29 CFR 39.130 DO DEFINE -- THEY SAY THEY
17 APPLY TO PROGRAMS OR ACTIVITIES CONDUCTED BY AN AGENCY,
18 INCLUDING THROUGH CONTRACTUAL OR LICENSING ARRANGEMENTS.

19 SO WE HAVE NOT ARGUED THAT THEY DON'T QUALIFY
20 AS PROGRAMS OR ACTIVITIES, BUT WE -- THAT REGULATION --
21 THE ADMINISTRATIVE REMEDY THROUGH THAT REGULATION IS WHAT
22 NEEDS TO BE FOLLOWED AND NOT PROCEEDING DIRECTLY AGAINST
23 THE AGENCY.

24 THE JERSEY HEIGHTS CASE IS ONE OF THE MOST
25 INFORMATIVE CASES IN THIS CONTEXT BECAUSE IT HELD THAT

1 THERE WAS NO PRIVATE RIGHT OF ACTION AGAINST AN AGENCY IN
2 THE TITLE VI CONTEXT WHERE THERE WAS A DIRECT REMEDY
3 AGAINST THE ENTITY, THE PRIVATE ENTITY, OR THE
4 NON-FEDERAL ENTITY THAT WAS ALLEGED TO HAVE COMMITTED THE
5 VIOLATION.

6 THE COURT: WHAT IF I REJECT -- I KNOW THAT
7 YOU AND GEO DON'T TAKE THE SAME VIEW ON THE
8 REHABILITATION ACT CLAIM -- BUT WHAT IF I DON'T AGREE
9 WITH YOUR ANALYSIS OF THE REHABILITATION ACT WITH RESPECT
10 TO GEO?

11 IT SEEMS -- AND I AM INTERESTED IN HEARING
12 FROM ALL THE PARTIES -- IT SEEMS THAT WHEN YOU ACTUALLY
13 STUDY THE REHABILITATION ACT, YOU SEE THAT IT WAS ENACTED
14 IN 1973 AND IT REACHED CERTAIN PRIVATE ACTORS, THOSE
15 RECEIVING (QUOTE) "FEDERAL FINANCIAL ASSISTANCE".

16 FROM THE TIME IT WAS ENACTED, THERE HAS ALWAYS
17 BEEN AN EXCEPTION IN THE REGULATIONS PROMULGATED
18 INITIALLY BY THE PREDECESSOR TO HHS. DOJ TOOK OVER
19 PROMULGATING THE REGS. BUT THERE ALWAYS HAS ALWAYS BEEN
20 AN EXCEPTION OUT FOR CONTRACT -- FOR FEDERAL PROCUREMENT
21 CONTRACTS FOR GOODS OR SERVICES.

22 THOSE CONTRACTORS AREN'T SWEPT INTO THE NOTION
23 OF RECEIVING FEDERAL FINANCIAL ASSISTANCE. I AM -- SO I
24 AM TRYING TO UNDERSTAND WHY DOJ SEEMS TO TAKE THE
25 POSITION, AND DOES YOUR REHABILITATION ARGUMENT ACT

1 DEPEND ON THE COURT ACCEPTING THAT THERE IS A
2 REHABILITATION ACT REMEDY AGAINST GEO?

3 WHAT IF I CONCLUDE AS A MATTER OF LAW THAT
4 THERE IS NOT BECAUSE THEY DON'T RECEIVE FEDERAL FINANCIAL
5 ASSISTANCE. ON PAGE 40, I BELIEVE, OF PLAINTIFF'S BRIEF,
6 FOOTNOTE 16, THEY SAY "WE ARE NOT CONTENDING IN THIS CASE
7 THAT GEO RECEIVED FEDERAL FINANCIAL ASSISTANCE."

8 SO THEY ARE HANGING THEIR HAT -- PLAINTIFF IS
9 HANGING HIS HAT ON THIS NOTION THAT RIVERS IS A PROGRAM
10 OR ACTIVITY CONDUCTED BY AN EXECUTIVE AGENCY; RIGHT?

11 SO IF I DON'T ACCEPT YOUR ARGUMENT, DO YOU
12 THEN BELIEVE THAT THERE IS A REHABILITATION ACT CLAIM
13 AGAINST THE AGENCY?

14 MS. WYER: WELL, FIRST OF ALL, YOUR HONOR,
15 THIS DOESN'T NEED TO REACH THAT ISSUE AT ALL BECAUSE THE
16 CLAIM COULD BE RESOLVED ON THE EXHAUSTION OF
17 ADMINISTRATIVE REMEDIES ISSUE.

18 SO IF THE COURT HOLDS THAT PLAINTIFF NEEDS TO
19 EXHAUST ADMINISTRATIVE REMEDIES UNDER THE DOJ REMEDY,
20 REMEDIAL PROCESS, THE ADMINISTRATIVE PROCESS, THERE IS NO
21 NEED TO REACH THE ISSUE OF WHETHER A CLAIM CAN BE BROUGHT
22 AGAINST THE BOP OR GEO BECAUSE THE CLAIM COULD BE
23 DISMISSED FOR FAILURE TO EXHAUST.

24 AND IF THE COURT DOES REACH THE NEXT STAGE,
25 THE QUESTION OF WHETHER THERE IS AN IMPLIED RIGHT OF

1 ACTION AGAINST THE AGENCY DIRECTLY UNDER SECTION 504 IS
2 REALLY THE ONLY QUESTION AT ISSUE HERE, AND BECAUSE THE
3 PLAINTIFF'S --

4 THE COURT: MY QUESTION TO YOU IS DOES THE
5 RESOLUTION OF THAT ISSUE, IN YOUR FAVOR, DEPEND ON MY
6 FINDING THAT GEO -- THAT, IN FACT, PLAINTIFF HAS STATED A
7 REHABILITATION ACT CLAIM AGAINST GEO. DOES IT DEPEND ON
8 THAT?

9 MS. WYER: NO, BECAUSE IN ORDER TO REACH THAT
10 ISSUE, THAT IS ONLY RELEVANT TO WHETHER IT WOULD BE
11 FUTILE FOR THE PLAINTIFFS TO AMEND THEIR COMPLAINT TO
12 ASSERT AN APA CLAIM.

13 THE ONLY -- THE PLAINTIFF HAS ONLY ASSERTED A
14 CLAIM DIRECTLY UNDER SECTION 504, SO THE ONLY CONCLUSION
15 THAT ISSUE WOULD BE DISPOSED OF BY A HOLDING THAT THERE
16 IS NO IMPLIED RIGHT OF ACTION AGAINST THE FEDERAL AGENCY.

17 THE COURT: WHAT IS YOUR POSITION ON WHETHER
18 IT WOULD BE FUTILE FOR THE PLAINTIFF TO SEEK TO AMEND TO
19 STATE AN APA CLAIM DIRECTLY AGAINST THE AGENCY? DO YOU
20 THINK THAT CLAIM WOULD BE FUTILE?

21 MS. WYER: YES, I DO.

22 THE COURT: WHY?

23 MS. WYER: BECAUSE THE ALTERNATIVE REMEDY
24 ARGUMENT IS ONLY ONE OF SEVERAL BARRIERS TO STATING A
25 VIABLE APA CLAIM AGAINST THE BOP.

1 THERE IS ALSO THE FINAL AGENCY ACTION
2 REQUIREMENTS WHICH WOULD REQUIRE THE PLAINTIFF TO
3 IDENTIFY AN ACTION THAT THE BOP TOOK THAT CAUSED HIS
4 ALLEGED INJURY, AND THE COMPLAINT, THERE ARE NO FACTS
5 THAT INDICATE THAT THERE HAS BEEN ANY FINAL AGENCY ACTION
6 OF THE BOP THAT CAUSED THE DISCRIMINATION ON THE BASIS OF
7 THE DISABILITY THAT THEY ALLEGE.

8 AND THAT WOULD IMPLICATE STANDING PROBLEMS
9 BECAUSE THERE WOULD BE A CAUSATION ISSUE.

10 THE COURT: OKAY. ANYTHING ELSE ON THE
11 REHABILITATION ACT CLAIM ON BEHALF OF THE UNITED STATES?

12 MS. WYER: NO, NOT AT THIS TIME.

13 THE COURT: THANK YOU FOR YOUR ARGUMENT. MR.
14 NUMBERS.

15 MR. NUMBERS: THANK YOU, YOUR HONOR.
16 OBVIOUSLY YOUR HONOR HAS READ THE BRIEFS AND MS. WYER
17 ARGUED ON A NUMBER OF THE POINTS, SO I AM NOT GOING TO
18 BELABOR A LOT OF ISSUES THAT YOU HAVE ALREADY COVERED.

19 I BELIEVE IT SUFFICES TO SAY THAT PLAINTIFFS,
20 ON THEIR BRIEF ON PAGE 17, SAY THAT GEO IS LIABLE UNDER
21 THE EIGHTH AMENDMENT BECAUSE IT HAS UNDERTAKEN PUBLIC
22 FUNCTION TO PROVIDE MEDICAL CARE TO FEDERAL INMATES.

23 THAT POSITION WAS EXPLICITLY REJECTED BY THE
24 FOURTH CIRCUIT IN HOLLY AT PAGE 294 OF THAT DECISION.

25 MOVING ON TO THE REHABILITATION ACTS CLAIM,

1 I THINK YOUR HONOR HAS IDENTIFIED THE MAIN ISSUE THERE.
2 GEO IS NOT A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE
3 AND PLAINTIFF ADMIT AS MUCH IN THEIR BRIEF.

4 AND NOT ONLY DOES THAT PRECLUDE A FINDING ON
5 THE FIRST PORTION OF THE REHABILITATION ACT THAT YOU MUST
6 RECEIVE FEDERAL FINANCIAL ASSISTANCE, IT'S GEO'S ARGUMENT
7 THAT IT ALSO PRECLUDES A FINDING THAT THE OPERATION IS A
8 PROGRAM OR ACTIVITY OF AN EXECUTIVE AGENCY BECAUSE THE
9 DEFINITION OF PROGRAM OR ACTIVITY WHICH I BELIEVE IS IN
10 SECTION 794(B) --

11 THE COURT: I READ YOUR ARGUMENT ABOUT THAT,
12 AND AGAIN, IF YOU ACTUALLY GO BACK AND STUDY THE ACT, DO
13 YOU KNOW WHEN SECTION 794(B) WAS ADDED? IT WASN'T THERE
14 IN 1973; WAS IT?

15 MR. NUMBERS: I DON'T BELIEVE SO, NO. IT WAS
16 PART OF THE '78 AMENDMENT TO MAKE THE REHABILITATION ACT
17 APPLY SPECIFICALLY TO --

18 THE COURT: IT WAS ACTUALLY ADDED IN 1988. IN
19 1978, THE LANGUAGE THAT MS. WYER WAS TALKING ABOUT WAS
20 ADDED TO THE ACT.

21 ORIGINALLY, 1973 REHABILITATION ACT, THE
22 TOUCHSTONE TO REACH INTO THE PRIVATE SECTOR WAS THIS
23 CONCEPT OF RECEIPT OF FEDERAL FINANCIAL ASSISTANCE.

24 AND AGAIN, SINCE THE ACT WAS ENACTED BY
25 CONGRESS, THERE HAS BEEN AN EXCEPTION OUT FOR GOODS OR

1 SERVICE PROVIDED PURSUANT TO A FEDERAL PROCUREMENT
2 CONTRACT.

3 NOW, 1978 WE HAVE THE CAUSE AT ISSUE THAT MS.
4 WYER DISCUSSED. IT WAS IN 1988 IN CONNECTION WITH THE
5 CONGRESS'S RESPONSE TO THE GROVE CITY DECISION THAT 29
6 U.S.C. SECTION 794(B) WAS ADDED.

7 AND WHEN YOU READ THAT PROVISION -- AND I KNOW
8 THAT YOU SUGGEST THAT THAT OUGHT TO INFORM THE COURT'S
9 DEFINITION OF THIS PHRASE THAT, AGAIN, PLAINTIFF IS
10 HANGING HIS ARGUMENT ON A PROGRAM OR ACTIVITY CONDUCTED
11 BY AN EXECUTIVE AGENCY, BUT THE WHOLE OF SECTION 794(B),
12 THERE IS A MODIFIER AGAIN DEALING WITH FEDERAL FINANCIAL
13 ASSISTANCE. AND I KNOW THAT THE STATUTORY LANGUAGE SAYS
14 FOR PURPOSES OF THIS SECTION.

15 BUT, YOU KNOW, WHEN YOU LOOK AT THE DEFINITION
16 IN 29 U.S.C. SECTION 794(B)(1), FOR EXAMPLE, THAT TALKS
17 ABOUT STATE OR LOCAL GOVERNMENTS, A PROGRAM OR ACTIVITY
18 CONDUCTED BY AN EXECUTIVE AGENCY. I DON'T KNOW HOW AN
19 EXECUTIVE AGENCY CAN CONDUCT A STATE OR LOCAL GOVERNMENT.

20 SO IT WOULDN'T SEEM -- AND I AM INTERESTED IN
21 HEARING YOUR ARGUMENT -- BUT IT WOULDN'T SEEM THAT THE
22 DEFINITION IN 794(B) HELPS TO INFORM, AT LEAST DIRECTLY,
23 WHAT CONGRESS MEANT WHEN IT ADDED IN 1978 THIS PHRASE,
24 PROGRAM OR ACTIVITY CONDUCTED BY AN EXECUTIVE AGENCY.

25 MR. NUMBERS: WELL, I THINK IN TERMS OF KIND

1 OF RECONCILING THOSE VARIOUS AMENDMENTS, I THINK THE
2 FEDERAL AGENCIES CAN WORK WITH STATE AND LOCAL
3 GOVERNMENTS TO PROVIDE FINANCIAL ASSISTANCE AND (B)(2)
4 AND RECEIVE THE REHABILITATION ACT IN OTHER CONTEXT AND
5 THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

6 THE FEDERAL GOVERNMENT, THROUGH ITS
7 DEPARTMENTS, OBVIOUSLY WORK WITH STATE AND LOCAL
8 GOVERNMENTS IN PROVIDING FEDERAL FINANCIAL ASSISTANCE AND
9 THINGS. SO I THINK IT STILL ALL GOES TOGETHER AND ALL
10 RELIES ON THE ACCEPTANCE OF FEDERAL FINANCIAL ASSISTANCE
11 BY --

12 THE COURT: THAT IS YOUR ARGUMENT. THAT IS,
13 YOUR ARGUMENT THAT -- YOUR ARGUMENT IS THAT -- THAT BY
14 NOT SEEKING TO BRING GEO IN, WITH THE NOTION THAT GEO
15 RECEIVES FEDERAL FINANCIAL ASSISTANCE, PLAINTIFF CANNOT,
16 AS A MATTER OF LAW, STATE A CLAIM AGAINST GEO. THAT IS
17 YOUR ARGUMENT; RIGHT?

18 MR. NUMBERS: YES, YOUR HONOR.

19 THE COURT: OKAY. ANYTHING ELSE ON THE
20 REHABILITATION ACT?

21 MR. NUMBERS: I DON'T BELIEVE SO.

22 THE COURT: ALL RIGHT.

23 MR. NUMBERS: I KNOW, ACCORDING TO THE
24 COMPLAINT, I THINK THE NEXT CLAIM IS THE BREACH OF
25 CONTRACT CLAIM, BUT I WON'T JUMP TO THE NEGLIGENCE CLAIM

1 BECAUSE THE BREACH OF CONTRACT CLAIM IS DERIVATIVE OF THE
2 NEGLIGENCE CLAIM. THE DISPUTE IS WHETHER RULE 9J BARS
3 PLAINTIFFS COMPLAINT. GEO ARGUES THAT IT DOES.
4 PLAINTIFFS, OBVIOUSLY, ARGUE THAT IT DOES NOT.

5 THE DISPUTE IS OVER THE LANGUAGE OF 9J.
6 PLAINTIFFS HANG THEIR HAT ON A DEFINITION IN SECTION
7 90-21.11 OF THE MEDICAL MALPRACTICE ACTION WHICH SAYS A
8 MEDICAL MALPRACTICE ACTION IS A CIVIL ACTION FOR DAMAGES.
9 THEIR ARGUMENT IS WE DIDN'T ASK FOR DAMAGES; THEREFORE,
10 IT'S NOT A MEDICAL MALPRACTICE ACTION. THE PROBLEM WITH
11 THAT ARGUMENT IS THAT THE TERM MEDICAL MALPRACTICE ACTION
12 APPEARS NOWHERE IN 9J. THAT TERM IS NOT PRESENT IN RULE
13 9J.

14 WHAT RULE 9J SAYS, ANY COMPLAINT ALLEGING
15 MEDICAL MALPRACTICE, AND IT GOES ON TO SAY AGAINST A
16 HEALTH CARE PROVIDER AS THAT TERM IS DEFINED IN SECTION
17 90-21.11.

18 SO AS YOUR HONOR RULED LAST WEEK, OR AS YOUR
19 HONOR NOTED IN THE HINES DECISION LAST WEEK, THE QUESTION
20 IS WHETHER THE COMPLAINT SEEKS RELIEF FROM A HEALTH CARE
21 PROVIDER AS THAT TERM IS DEFINED BY STATUTE OR FAILS TO
22 DELIVER OR IMPROPERLY DELIVER PROFESSIONAL SERVICE.

23 IN THIS CASE, I DON'T THINK THERE IS MUCH
24 DISPUTE, THE COMPLAINT DOESN'T MAKE THOSE ALLEGATIONS.
25 THERE IS ALSO NO DISPUTE THAT THE COMPLAINT DOESN'T

1 CONTAIN THE NEXT 9J CERTIFICATION, AND I DON'T BELIEVE IT
2 CONTAINS THE FACTUAL ALLEGATIONS SUFFICIENT FOR A RES
3 IPSA LOQUITUR CLAIM.

4 I THINK ALSO THAT THE TERM MEDICAL MALPRACTICE
5 ACTION, THE BEGINNING OF THAT DEFINITION SAYS, "AS USED
6 IN THIS SECTION, THE TERM MEDICAL MALPRACTICE ACTION
7 MEANS", AND IT GOES ON TO DEFINE THE TERM. THAT IS
8 SECTION 1A -- OR CHAPTER 1B OF CHAPTER 90 OF THE NORTH
9 CAROLINA GENERAL STATUTES.

10 RULE 9J IS IN CHAPTER 1A OF NORTH CAROLINA
11 RULES OF CIVIL PROCEDURE, SO THERE IS NOT A VERY STRONG
12 ARGUMENT THAT THAT DEFINITION APPLIES. AND WHEN THE
13 GENERAL ASSEMBLY WANTED TO USE THE TERM MEDICAL
14 MALPRACTICE ACTION, THEY DID SO.

15 IN RULE 702 OF THE NORTH CAROLINA RULES OF
16 EVIDENCE WHERE IT'S TALKING ABOUT EXPERT CERTIFICATION,
17 IT SAYS, "IN A MEDICAL MALPRACTICE ACTION AS DEFINED IN
18 SECTION 90-21.11."

19 SO PLAINTIFF'S ARGUMENT FAILS TO -- DOESN'T
20 HAVE ENOUGH LEGS TO STAND ON BECAUSE THIS IS NOT A
21 MEDICAL MALPRACTICE ACTION. THIS IS A COMPLAINT ALLEGING
22 MEDICAL MALPRACTICE. THEY ARE TWO ENTIRELY DIFFERENT
23 TERMS AND TWO ENTIRELY DIFFERENT MEANINGS. AND BECAUSE
24 IT DOESN'T HAVE THE 9J CERTIFICATION, IT MUST BE
25 DISMISSED ACCORDING TO NORTH CAROLINA LAW.

1 ON THE BREACH OF CONTRACT CLAIM, WE ARE
2 DEALING WITH A VERY NARROW ISSUE HERE ON THE BREACH OF
3 CONTRACT CLAIM. GEO'S ARGUMENT IS THAT BECAUSE THIS IS A
4 CLAIM BY MEMBERS OF THE PUBLIC AGAINST A GOVERNMENT
5 CONTRACTOR THAT WAS ESTABLISHED THAT THE CONTRACT
6 PROVIDES AN INTENT FOR THEM TO --

7 THE COURT: DOES THIS COURT HAVE SUBJECT
8 MATTER JURISDICTION OVER THAT CLAIM IN YOUR VIEW?

9 LET'S SAY THIS CLAIM WERE A STAND-ALONE CLAIM.
10 I HAVE READ THE COMPLAINT. THE COMPLAINT CITES AS A
11 JURISDICTIONAL BASIS 1331 -- 28 U.S.C. 1343 AND 28 U.S.C.
12 1367.

13 IF THIS WE WERE A STAND-ALONE CLAIM WHERE
14 SOMEBODY -- BECAUSE THERE ARE DIFFERENT PEOPLE REFERENCED
15 IN THIS CONTRACT -- THERE ARE EMPLOYEES REFERENCED IN
16 HERE AND THERE ARE A LOT OF GOVERNMENT CONTRACTORS IN THE
17 EASTERN DISTRICT OF NORTH CAROLINA. AND SO OBVIOUSLY ANY
18 DECISION, THE COURT HAS AN IMPACT BEYOND JUST THIS CASE.

19 IF THIS WERE A STAND-ALONE CLAIM, DO YOU THINK
20 THERE IS SUBJECT MATTER JURISDICTION OVER A THIRD PARTY
21 BENEFICIARY CLAIM UNDER A FEDERAL CONTRACT?

22 MR. NUMBERS: I BELIEVE MY RESEARCH ON THIS
23 ISSUE, YOUR HONOR, AND I BELIEVE THE PLAINTIFF REACHED
24 THE SAME CONCLUSION, IS THAT FEDERAL CONTRACTS ARE
25 TYPICALLY GOVERNED BY FEDERAL COMMON LAW.

1 THE COURT: I KNOW. BUT TO SAY SOMETHING IS
2 GOVERNED BY FEDERAL LAW IS NOT THE SAME THAT IT IS A
3 CLAIM ARISING UNDER THE CONSTITUTION OR AN ACT OF
4 CONGRESS; RIGHT?

5 I MEAN, SOMETIMES PEOPLE COME INTO COURT HERE,
6 NOT TOO OFTEN, MOST OF THESE THINGS GET LITIGATED IN
7 D.C., BUT SOMETIMES PEOPLE WILL COME IN AND SAY, I NEED
8 AN INJUNCTION BECAUSE THE FEDERAL GOVERNMENT IS VIOLATING
9 THE COMPETITION AND CONTRACTING ACT. THEY ARE NOT
10 FOLLOWING THEIR P'S AN Q'S IN CONNECTION WITH WHAT THE
11 STATUTE, THE CONGRESS ENACTED IN CONNECTION WITH WHAT
12 CONTRACTING REQUIRES, AND I WANT YOU, JUDGE, TO ENTER AN
13 INJUNCTION.

14 ALL RIGHT. THERE IS A FEDERAL ACT OF CONGRESS
15 THAT THE CLAIM ARISES UNDER, BUT CAN SOMEONE JUST COME
16 INTO A FEDERAL COURT, CITE A FEDERAL CONTRACT, AND STATE
17 A CLAIM OVER WHICH THIS COURT HAS JURISDICTION?

18 MR. NUMBERS: I THINK IT'S GOING TO DEPEND ON
19 THE TERMS OF THE CONTRACT AND THE PARTIES WHO ARE SEEKING
20 TO ENFORCE IT.

21 THE COURT: DO YOU THINK THERE IS JURISDICTION
22 IN THIS CASE OVER COUNT 4 WHICH IS THE CONTRACT CLAIM?

23 MR. NUMBERS: TO BE HONEST, YOUR HONOR, IT'S
24 NOT AN ISSUE I SPENT A GREAT DEAL OF TIME FOCUSING ON
25 THAT PARTICULAR ISSUE. I WOULD HAVE TO SAY YES, TO BE

1 HONEST, BUT OBVIOUSLY THAT FINAL DECISION RESTS WITH YOU.

2 THE COURT: WHY? 1367?

3 MR. NUMBERS: I BELIEVE BECAUSE OF THE --

4 THE COURT: THERE IS CLEARLY JURISDICTION OVER
5 COUNTS 1 AND 2. NO QUESTION ABOUT IT. BUT YOU THINK
6 UNDER 1367, AS LONG AS SOMEONE DOES -- I MEAN, THEY HAVE
7 A CLAIM UNDER THE EIGHTH AMENDMENT, AGAIN, WHETHER IT
8 STATES A CLAIM IS DIFFERENT THAN JURISDICTION; RIGHT?
9 THEY HAVE A CLAIM UNDER THE REHABILITATION ACT AND AGAIN,
10 WHETHER IT STATES A CLAIM IS DIFFERENT THAN WHETHER THERE
11 IS SUBJECT MATTER JURISDICTION OVER THAT CLAIM.

12 SO YOU BELIEVE THAT IN COUNT 4 THERE IS
13 JURISDICTION BECAUSE OF 28 U.S.C. SECTION 1367?

14 MR. NUMBERS: I BELIEVE IN THIS CASE THERE IS
15 JURISDICTION TO DECIDE IT. NOW, THE ISSUE WOULD BE, FROM
16 GEO'S STANDPOINT, THAT THEY DON'T HAVE -- THE CONTRACT
17 DOES NOT PROVIDE THIRD PARTY RIGHTS AND THEREFORE THE
18 CLAIM FAILS.

19 THE COURT: RIGHT. THAT IS A DIFFERENT ISSUE
20 THAN WHETHER THERE IS SUBJECT MATTER JURISDICTION OVER
21 IT. I JUST WANTED TO UNDERSTAND BECAUSE IN MY OWN
22 RESEARCH I HAVE FOUND A SIXTH CIRCUIT CASE THAT SAID
23 THERE IS NO SUBJECT MATTER JURISDICTION OVER THIS TYPE OF
24 CLAIM. BUT GO AHEAD.

25 YOU GO AHEAD TO YOUR PRINCIPAL ARGUMENT ON THE

1 FAILURE TO STATE A CLAIM UNDER THE THIRD PARTY
2 BENEFICIARY CLAIM. YOU THINK THIS IS A CLAIM ARISING
3 UNDER -- OR THAT FEDERAL COMMON LAW GOVERNS IT?

4 MR. NUMBERS: THERE ARE CASES OUT THERE THAT
5 SAY THAT FEDERAL CONTRACTS WITH THE -- I AM SORRY --
6 CONTRACTS WITH -- BETWEEN FEDERAL GOVERNMENT AND
7 GOVERNMENT CONTRACTORS DO FALL UNDER FEDERAL COMMON LAW
8 AND THEREFORE THERE WOULD BE SUBJECT MATTER JURISDICTION.

9 I HAVEN'T SEEN THE CASE YOUR HONOR REFERENCED,
10 BUT OBVIOUSLY AT LEAST ONE COURT REACHED THAT CONCLUSION.
11 OUR PRIMARY ARGUMENT IS THAT THE CONTRACT MUST REFLECT
12 THE INTENT TO BENEFIT THE ALLEGED THIRD PARTY BENEFICIARY
13 AND THE CONTRACT MUST GIVE THE THIRD PARTY BENEFICIARY
14 THE DIRECT RIGHT TO ENFORCE THAT RIGHT AGAINST THE
15 GOVERNMENT CONTRACTOR.

16 IN THIS CASE, THE RIVERS CONTRACT EXPLICITLY
17 SAYS THAT AWARDING THIS CONTRACT, THE GOVERNMENT DOES NOT
18 ASSUME ANY LIABILITY TO THIRD PARTIES. AND THE
19 PLAINTIFF, IN THEIR RESPONSE, SAY THAT WAS NEVER BROUGHT
20 UP. IT'S CLEARLY REFERENCED IN OUR BRIEF AT SEVERAL
21 POINTS. THERE IS NO DIRECT RIGHT FOR INMATES TO ENFORCE
22 THIS CONTRACT AGAINST GEO. THE CONTRACT HAS A
23 COMPLICATED AND CONVOLUTED SYSTEM WHERE THE BOP MONITORS
24 AND CONDUCTS QUALITY CONTROL, AND GEO HAS TO CONDUCT
25 QUALITY CONTROL, AND THERE ARE IMPACTS ON HOW MUCH MONEY

1 GEO RECEIVES FROM THE FEDERAL GOVERNMENT IS THEY FAIL TO
2 ADHERE TO VARIOUS PORTIONS OF THE CONTRACT. SO THINGS
3 ARE SPELLED OUT AS TO WHAT GOES ON WHEN A CONTRACT IS
4 NOT -- WHEN ONE PARTY BELIEVES THE CONTRACT IS NOT BEING
5 ADHERED TO.

6 NOWHERE IS THERE AN EXPLICIT RIGHT FOR INMATES
7 TO DIRECTLY ENFORCE A CONTRACT. AND IN TERMS OF AN
8 INTENT TO BENEFIT THE INMATES, THE CONTRACT HAS A PORTION
9 LABELED INMATE RIGHTS WHERE IT SPECIFIES SPECIFIC RIGHTS
10 OF THESE INMATES UNDER THE RIVERS CONTRACT. THIS ISSUE
11 OF HEALTH CARE IS NOT ONE OF THEM.

12 THE COURT: DO YOU THINK -- AND I HAVE READ
13 THE WHOLE CONTRACT -- DO YOU THINK THAT PROVISION, AND DO
14 YOU THINK IT HAD TO DO WITH THEIR RELIGIOUS RESTORATION
15 ACT? DO YOU THINK THAT THAT PROVISION WOULD PROVIDE AN
16 INMATE A THIRD PARTY CONTRACT CLAIM?

17 MR. NUMBERS: NO, YOUR HONOR, BECAUSE THERE IS
18 STILL NO DIRECT RIGHT TO ENFORCE THAT AGAINST GEO.

19 THE COURT: OKAY.

20 MR. NUMBERS: AND I THINK THAT THE CASES WE
21 HAVE CITED -- ALTHOUGH THE PLAINTIFF DISCOUNTS THEM --
22 ARE VERY SIMILAR TO WHAT IS GOING ON HERE. THE WYNN
23 CASE, THAT WAS A THIRD CIRCUIT CASE, BUT IN THE WYNN
24 CASE, THE CONGRESS PASSED A LAW ALLOWING A FEDERAL AGENCY
25 TO CONTRACT WITH PRIVATE CONTRACTORS TO PROVIDE GRANTS

1 TO --

2 THE COURT: PLAINTIFF SUGGESTS THOUGH THAT
3 TRIMBLE NEEDS TO BE MY GUIDING LIGHT, AND THAT TRIMBLE
4 DOESN'T HAVE THE STANDARD THAT YOU HAVE DESCRIBED, AND
5 YOU ALSO CITED A CASE FROM THE DISTRICT OF NEW JERSEY AND
6 I HAVE READ IT. WHAT DO YOU HAVE TO SAY TO THAT
7 ARGUMENT?

8 MR. NUMBERS: TRIMBLE WOULD APPLY IF THE
9 ALLEGED THIRD PARTY BENEFICIARY WAS A FOREIGN GOVERNMENT
10 LIKE IT WAS IN TRIMBLE. TRIMBLE WAS NOT A CASE WHERE A
11 MEMBER OF THE PUBLIC BROUGHT A CASE AGAINST THE
12 GOVERNMENT CONTRACTOR. IT WAS A UNITED STATES -- OR
13 UNITED KINGDOM, ADMINISTRATION OF THE DEFENSE, BRINGING A
14 CONTRACT AGAINST A GOVERNMENT CONTRACTOR FOR, I BELIEVE,
15 ARMED SALES, AND THINGS LIKE THAT. AND THE STANDARD IS
16 JUST DIFFERENT WHEN YOU ARE DEALING WITH A CASE THAT DOES
17 NOT INVOLVE MEMBERS OF THE PUBLIC BRINGING CLAIMS AGAINST
18 A GOVERNMENT CONTRACTOR FOR A CONTRACT THAT BENEFITS THE
19 PUBLIC AS A WHOLE. THAT IS THE DISTINCTION BETWEEN
20 TRIMBLE AND THIS CASE.

21 THE COURT: AND IN THE THIRD CIRCUIT CASE AND
22 DISTRICT OF NEW JERSEY CASE WERE THE PEOPLE TRYING TO
23 BRING THOSE CLAIMS DETAINEES?

24 MR. NUMBERS: IN THE JAMA (PHONETIC) CASE THEY
25 WERE.

1 THE COURT: WASN'T ONE OF THEM -- IT'S NOW
2 CALLED ICE. I MEAN, IT USED TO BE THE INS.

3 MR. NUMBERS: YES, YOUR HONOR. IT WAS A
4 PRIVATELY OWNED FACILITY WHERE THE DETAINEES RAISED
5 CLAIMS OF BREACH OF CONTRACT FOR VARIOUS REASONS AND THE
6 THIRD CIRCUIT SAID THERE IS NO BREACH OF CONTRACT CLAIM
7 HERE. AND THAT IS VERY ANALOGOUS.

8 AND PLAINTIFFS MADE THE ARGUMENT THAT THIS IS
9 NARROW CONTRACT THAT DEALS WITH A NARROW SET OF PEOPLE,
10 BUT I THINK THE WYNN CASE FROM THE THIRD CIRCUIT ALSO
11 DISPOSES OF THAT BECAUSE THE GROUP WHO ALLEGEDLY CLAIMED
12 THE BENEFIT IN THAT CASE WAS SOUTH EASTERN VIETNAMESE
13 REFUGEES OR SOME VERY SPECIFIC GROUP LIKE THAT WHERE THE
14 CONTRACT WAS DESIGNED OBVIOUSLY TO PROVIDE SERVICES, BUT
15 NOT TO PROVIDE, YOU KNOW, THE THIRD PARTY BENEFICIARY,
16 INTENDED BENEFICIARY.

17 AND SO THIS IS A CONTRACT OF BENEFIT TO THE
18 GENERAL PUBLIC BECAUSE TO HELP THE BOP COMPLETE ITS
19 MANDATE TO PROVIDE CARE TO PRISONERS, AND THERE IS NO
20 INTENT OR NO INTENT -- THERE IS NO LANGUAGE THAT SHOWS AN
21 INTENT TO BENEFIT THE INMATE DIRECTLY AND THERE IS NO
22 LANGUAGE THAT ALLOWS A RIGHT TO ENFORCE THE CONTRACT
23 DIRECTLY AGAINST GEO.

24 I THINK ONE OF THE BIGGER POLICY CONCERNS IS
25 THAT IF THIS PLAN IS ALLOWED TO GO FORWARD, THEN INMATES

1 CAN ENFORCE EVERY SINGLE PORTION OF THE RIVERS CONTRACT
2 AGAINST GEO, AND DEPENDING ON HOW YOUR HONOR DECIDES THE
3 SUBJECT MATTER JURISDICTION ISSUE WHICH IS OBVIOUSLY ON
4 THE TABLE.

5 THE COURT: DO YOU THINK IT WOULD BE LIMITED
6 TO THAT? I MEAN, I KNOW PLAINTIFF ONLY BRINGS HIS CLAIM
7 AGAINST GEO, AND I KNOW THE UNITED STATES HASN'T TAKEN A
8 POSITION ON THE ISSUE, BECAUSE THEY HAVEN'T BEEN SUED ON
9 THIS CLAIM, BUT WOULDN'T A RULING, YOU KNOW, PERMIT AN
10 INMATE ACTUALLY TO PICK A DEFENDANT?

11 WHY WOULDN'T THE -- I CAN'T THINK OF A
12 LIMITING PRINCIPLE THAT IF THE CLAIM IS RECOGNIZED THAT
13 THE UNITED STATES WOULDN'T BE SUBJECT TO THIS. I MEAN,
14 THEY HAVEN'T BEEN IN THIS CASE.

15 MR. NUMBERS: I THINK YOU ARE ABSOLUTELY
16 RIGHT, YOUR HONOR. THE UNITED STATES OBVIOUSLY IS A
17 PARTY TO THE CONTRACT AND WOULD BE JUST AS LIABLE AS GEO
18 FOR ANY THIRD PARTY BREACH OF CONTRACT OR AT LEAST AS
19 OPEN TO CLAIMS OF LIABILITY AS GEO IS BECAUSE OF THE WAY
20 THE CONTRACT IS WRITTEN AND THE FACT THAT IT'S THIRD
21 PARTY BENEFICIARY, SO THEY COULD ATTACK BOTH DEPENDING ON
22 WHO THEY THOUGHT THEY WOULD HAVE AN EASIER TIME
23 PREVAILING AGAINST.

24 BUT UNLESS YOUR HONOR HAS ADDITIONAL
25 QUESTIONS, THAT IS KIND OF THE TOTAL OF MY ARGUMENT. I

1 THINK THAT WHILE ISSUES INVOLVING RIVERS AND PRIVATE
2 PRISON MANAGEMENT AND THE RELATIONSHIP WITH THE FEDERAL
3 GOVERNMENT IS KIND OF A DEVELOPING AREA OF LAW, I THINK
4 THE ISSUES IN THIS CASE ARE FAIRLY SETTLED AND THEY ARE
5 SETTLED IN FAVOR OF GEO. AND SOME OF THE CLAIMS ARE
6 SETTLED IN FAVOR OF THE BOP, SO WE WOULD ASK YOU TO GRANT
7 OUR MOTION TO DISMISS AND DISMISS ALL CLAIMS AGAINST GEO.

8 THE COURT: THANK YOU. AT THIS TIME THE COURT
9 WILL HEAR FROM -- IS IT MR. RIDINGS?

10 MR. RIDINGS: RIDINGS; YES, YOUR HONOR.
11 THAT'S CORRECT. THANK YOU.

12 GOOD MORNING, YOUR HONOR.

13 THE COURT: GOOD MORNING.

14 MR. RIDINGS: COUNSEL. AGAIN, MY NAME IS
15 DONALD RIDINGS, APPEARING THIS MORNING FOR THE
16 PLAINTIFFS. YOUR HONOR, WHAT I WOULD LIKE TO DO IS I
17 WOULD ADDRESS, WITH THE COURT'S PERMISSION, THE FEDERAL
18 CLAIMS AS WELL AS THE NEGLIGENCE CLAIM.

19 MY COLLEAGUE, LAURA SCHATTSCHEIDER, WILL
20 ADDRESS THE OTHER ISSUE.

21 I WOULD LIKE TO BEGIN WITH WHERE THE COURT
22 BEGAN WHICH IS WITH THE EIGHTH AMENDMENT AND I WOULD ALSO
23 LIKE TO BEGIN WITH THE FEDERAL DEFENDANTS.

24 BEFORE I DO THAT, IF I COULD JUST TAKE A
25 MOMENT TO REVIEW THE ALLEGATIONS OF THE COMPLAINT THAT

1 ARE PERTINENT TO THE MOTIONS THAT ARE BEFORE YOU TODAY,
2 VERY BRIEFLY.

3 YOUR HONOR HAS READ THE PAPERS. YOU KNOW WE
4 HAVE ALLEGED A SYSTEMIC BREAKDOWN IN THE MEDICAL CARE AT
5 RIVERS AND WE HAVE IDENTIFIED SPECIFICALLY FOUR AREAS
6 WHERE WE BELIEVE THAT BREAKDOWN HAS OCCURRED, AS YOU
7 KNOW.

8 FIRST, ACCESS TO MEDICAL CARE. SECOND, STAFF
9 IN TRAINING AND RELATED PERSONNEL RESPONSIBILITIES.
10 THIRD, ACCESS TO MEDICATIONS. AND FINALLY, THE FAILURE
11 TO TREAT INFECTIOUS DISEASES. AND WE HAVE SUPPORTED
12 THOSE ALLEGATIONS NOT SIMPLY THROUGH CONCLUSORY
13 STATEMENTS, YOUR HONOR, BUT WE HAVE ILLUSTRATED THEM
14 THROUGH ALLEGATIONS PERTAINING TO 11 MEN WHO ARE OR HAVE
15 BEEN INCARCERATED AT THE RIVERS FACILITY AND THOSE
16 VIOLATIONS, IT IS ALLEGED, HAVE PERSISTED OVER A LONG
17 PERIOD OF TIME, MORE THAN TWO AND A HALF YEARS.

18 NOW, THE COMPLAINT ALSO DESCRIBES, OF COURSE,
19 THE CONSEQUENCES OF THOSE BREAKDOWNS, AND I WON'T REVIEW
20 THEM, THINGS LIKE AMPUTATIONS AND SERIOUS MEDICAL
21 PROBLEMS, AND CAUSES AND CONSEQUENCES OF THOSE FAILURES
22 IN MEDICAL CARE.

23 IMPORTANT FOR THE MOTIONS TODAY, IN PARTICULAR
24 THE COMPLAINT ALLEGES THAT THE DEFENDANTS KNEW ABOUT AND
25 DISREGARDED THOSE RISKS. AND WHEN I SAY DEFENDANTS, I

1 INCLUDE THE FEDERAL DEFENDANTS IN THAT WORD. CLEARLY, I
2 DON'T THINK THERE IS ANY DISPUTE NOR IS IT BEFORE THE
3 COURT THIS MORNING THAT THOSE ALLEGATIONS AT LEAST
4 SATISFY THE EIGHTH AMENDMENT STANDARD FOR CLAIM OF
5 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS AND
6 CONCERNs. THE DEFENDANTS HAVE NOT DISPUTED THAT. THAT
7 IS THE TEST THAT COMES OUT OF THE FARMER CASE. IT HASN'T
8 DEVIATED. BECAUSE THEY DON'T DISPUTE IT, I DON'T THINK,
9 OF COURSE, WE SHOULD SPEND MORE TIME ON IT THIS MORNING.

10 LET ME TURN NOW SPECIFICALLY TO THE FEDERAL
11 DEFENDANTS AND THE PRINCIPAL DEFENSE THAT THEY HAVE
12 RAISED WHICH IS WERE THE BOP, WHERE THE DIRECTOR OF THE
13 BOP, WHAT YOU HAVE BEEN TALKING ABOUT, PLAINTIFFS, IS
14 STUFF THAT HAPPENED AT RIVERS, A FACILITY OPERATED BY GEO
15 THAT DOESN'T HAVE ANYTHING TO DO WITH US. WE CAN'T BE
16 LIABLE.

17 YOUR HONOR, PLAINTIFF'S PRINCIPLE THEORY IN
18 THIS CASE IS THAT THE FEDERAL DEFENDANTS ARE DIRECTLY
19 LIABLE FOR A VIOLATION OF THE EIGHTH AMENDMENT. THE
20 COMPLAINT IN GREAT DETAIL ALLEGES FACTS FROM WHICH THE
21 COURT COULD REASONABLY INFER DELIBERATE INDIFFERENCE ON
22 THE PART OF THE FEDERAL DEFENDANTS IN THIS CASE.

23 THOSE FACTS INCLUDE THAT THEY HAD -- THE BOP
24 HAD OFFICIALS STATIONED ON SITE AT THE FACILITY. THAT IS
25 IN PARAGRAPHS 32 THROUGH 34 OF OUR COMPLAINT. THEY HAD

1 2,500 SQUARE FOOT OFFICE ON SITE WITH TEN PARKING SPACES,
2 THAT THEY EXERCISED CONTROL OVER PERSONNEL DECISIONS,
3 POLICIES AND PROCEDURES. THAT, OF COURSE, IS TIED
4 DIRECTLY TO ONE OF THE FOUR DEFICIENCIES THAT WE HAVE
5 ALLEGED, ONE OF THE FOUR BREAKDOWNS, AND THAT IS
6 PARAGRAPH 33; THAT THE BOP MONITORED AND OVERSAW THE
7 CENTRAL FUNCTIONS AT RIVERS. THAT COMES DIRECTLY OUT OF
8 THE COMPLAINT WHICH WE ATTACHED TO THE CONTRACT WHICH WE
9 ATTACHED TO THE COMPLAINT; THAT THE LEAD BOP
10 REPRESENTATIVE ON SITE WAS (QUOTE) "RESPONSIBLE" FOR THE
11 TECHNICAL DIRECTION OF THE PERFORMANCE OF ALL WORK UNDER
12 THE CONTRACT, ALSO DIRECTLY OUT OF THE COMPLAINT.

13 AND WE HAVE ALLEGED, MOREOVER, THAT THESE WERE
14 NOT ISOLATED EVENTS. THESE WERE VIOLATIONS THAT WERE
15 OPEN AND NOTORIOUS, THAT IN MANY CASES OCCURRED IN PLAIN
16 SIGHT, EVEN IN THE COURTYARD OF THE FACILITY, OF THE
17 CASES OF THE PILL LINE WHICH WE DESCRIBED IN OUR
18 ALLEGATIONS DEALING WITH ACCESS TO MEDICATIONS.

19 YOUR HONOR, THE PLAINTIFFS, WE BELIEVE, HAVE
20 ALLEGED SUFFICIENT FACTS AT THIS VERY EARLY, VERY
21 PRELIMINARY STAGE OF THIS CASE, FROM WHICH THE COURT OR A
22 FACT FINDER COULD REASONABLY INFER THAT THE FEDERAL
23 DEFENDANTS KNEW ABOUT AND DISREGARDED SERIOUS MEDICAL
24 RISKS TO THOSE PRISONERS. THAT IS A DIRECT CLAIM AGAINST
25 THE FEDERAL DEFENDANTS, AND THAT IS A LITTLE BIT

1 DIFFERENT THAN WHAT HAS HAPPENED IN MANY OF THE CASES
2 BEFORE.

3 LET ME BE VERY CLEAR ABOUT THIS. THAT DIRECT
4 CLAIM DOES NOT DEPEND ON WHETHER GEO IS A GOVERNMENT
5 ACTOR BECAUSE IT IS A DIRECT CLAIM AGAINST THE FEDERAL
6 DEFENDANTS. NOR DOES IT DEPEND ON WHETHER THE ACTS OF
7 GEO OR ITS EMPLOYEES CAN SOMEHOW BE IMPUTED TO THE
8 FEDERAL DEFENDANTS.

9 NOW, WE BELIEVE THEY CAN, AND I WILL COME TO
10 THAT WHEN I TALK ABOUT GEO, BUT OUR CLAIM AGAINST THE
11 FEDERAL DEFENDANTS DOES NOT DEPEND ON THAT. NOR DOES IT
12 DEPEND ON A THEORY OF SUPERVISORY LIABILITY, ALTHOUGH
13 OBVIOUSLY ALLEGATIONS PERTAINING TO --

14 THE COURT: DO YOU THINK THAT CLAIM IS SUBJECT
15 TO THE PLRA, AND HAS PLAINTIFF EXHAUSTED, IF IT IS.

16 MR. RIDINGS: IF IT IS, I THINK IT PROBABLY IS
17 SUBJECT TO THE PLRA, THE SAME WAY THAT, FOR EXAMPLE, A
18 DIRECT CLAIM WOULD BE SUBJECT TO THE PLRA IF THEY WERE
19 INCARCERATED IN A BOP PRISON. BUT AS I WILL TALK ABOUT
20 IN A MOMENT OR I THINK AS WE HAVE CERTAINLY DESCRIBED IN
21 OUR BRIEF, OUR PLAINTIFFS HAVE SATISFIED ANY EXHAUSTION
22 REQUIREMENT --

23 THE COURT: HAVE?

24 MR. RIDINGS: HAVE SATISFIED ANY EXHAUSTION
25 REQUIREMENT CERTAINLY AGAINST THE FEDERAL DEFENDANTS AT

1 THIS STAGE OF THE PROCEEDING.

2 AND SO I THINK IT'S VERY IMPORTANT TO KEEP IN
3 MIND THAT OUR PRINCIPLE THEORY OF LIABILITY IS A DIRECT
4 CLAIM, NOT A DERIVATIVE CLAIM. YOU DON'T NEED TO MAKE A
5 STATE ACTION FINDING IN ORDER TO FIND THAT WE STATED A
6 CLAIM.

7 THE COURT: WHERE DO YOU ALLEGE THAT YOUR
8 PLAINTIFF HAS EXHAUSTED UNDER THE PLRA?

9 MR. RIDINGS: I DON'T KNOW THAT WE HAVE
10 ALLEGED IN OUR COMPLAINT, YOUR HONOR, BUT UNDER THE JONES
11 DECISION, I DON'T BELIEVE WE ARE REQUIRED TO.

12 THE COURT: BUT YOU BELIEVE -- IN FACT, THERE
13 IS AN AFFIDAVIT OR DECLARATION SUBMITTED THAT THE BOP
14 SUBMITTED SAYING THAT CERTAINLY THE BOP SUBMITTED IT IN
15 CONNECTION WITH THE REHABILITATION ACT CLAIM SUGGESTING
16 THAT, IN FACT, THERE HASN'T BEEN A SUBMISSION. AND I AM
17 SURE ONE OF YOU ALL CITED IN THE PAPERS THE SIMMAT
18 DECISION THAT JUDGE MCCONNELL -- THEN JUDGE MCCONNELL --
19 WROTE FOR THE TENTH CIRCUIT.

20 THAT ULTIMATELY DEALT WITH A PRISONER SEEKING
21 DENTAL CARE IN A BOP FACILITY, AND THE TENTH CIRCUIT IN
22 THAT CASE ULTIMATELY DISMISSED THAT CLAIM FOR -- AGAINST
23 THE BOP FOR FAILURE TO EXHAUST.

24 SO YOU TAKE THE POSITION THAT MR. COLLAND HAS
25 EXHAUSTED HIS EIGHTH AMENDMENT CLAIM.

1 MR. RIDINGS: WE TAKE THE POSITION TO THE
2 EXTENT THAT THE COURT FOUND THAT AN EXHAUSTION
3 REQUIREMENT DID APPLY AGAINST -- IN A CLAIM SUCH AS THIS,
4 EVEN WHERE HE IS NOT INCARCERATED IN A FEDERAL FACILITY,
5 THAT SUCH AN EXHAUSTION IS --

6 THE COURT: I THOUGHT YOU SAID THAT BECAUSE
7 IT'S A DIRECT CLAIM AGAINST THE BOP, THE WAY YOU
8 UNDERSTAND THE PLRA, THAT HE WOULD HAVE TO EXHAUST.

9 MR. RIDINGS: I AM PREPARED TO TAKE ON THAT
10 BURDEN FOR PURPOSES OF THIS ARGUMENT AND RESPOND THAT HE
11 SATISFIED THAT REQUIREMENT FOR THIS REASON. IN THE JONES
12 CASE, WHICH IS THE SUPREME COURT CASE THAT WE ALL READ
13 AND KNOW ABOUT, WHAT THE JONES CASE SAID IS THAT WE LOOK
14 TO THE EXHAUSTION REQUIREMENTS OF THE FACILITY AT THE
15 PRISON, AND THERE HAS BEEN NO ALLEGATION NOR I THINK
16 COULD THERE BE ONE WITH THE RULES WE ALL OPERATE UNDER,
17 THAT HE HAS NOT EXHAUSTED HIS PRISON REMEDIES OF GEO.
18 THAT'S ALL HE IS REQUIRED TO DO.

19 AND TO THE EXTENT THAT THERE IS AN EXHAUSTION
20 REQUIREMENT FOR A DIRECT CLAIM AGAINST THE FEDERAL
21 DEFENDANTS, THAT HAS BEEN SATISFIED. THERE IS NO
22 REQUIREMENT THAT HE GO ON AND THEN EXHAUST SOME SEPARATE
23 BOP DOJ REGULATORY REGIME.

24 I THINK THAT IS, IF NOT DIRECTLY FORECLOSED BY
25 THE JONES DECISION, CERTAINLY QUITE INCONSISTENT WITH THE

1 THRUST OF THAT DECISION, WHICH IS LOOK TO THE RULES AT
2 THE PLACE IN WHICH THE PRISONER IS INCARCERATED TO
3 DETERMINE THE EXHAUSTION REQUIREMENTS.

4 NOW, YOUR HONOR, THE DIRECT CLAIM THAT WE HAVE
5 ASSERTED, THE FRAMEWORK FOR THAT CLAIM, IS EXACTLY THE
6 SAME AS THE ONE THAT APPLIES TO ANY OTHER EIGHTH
7 AMENDMENT CLAIM, WHETHER THE FEDERAL DEFENDANTS WERE
8 DELIBERATELY INDIFFERENT TO THE SERIOUS MEDICAL NEEDS OF
9 THE PRISONERS, AND THAT, WE SUBMIT, GIVEN ALL OF THE
10 KNOWLEDGE THAT ONE CAN REASONABLY INFER, SATISFIES THE
11 DELIBERATE INDIFFERENCE STANDARD OF THE SERIOUS MEDICAL
12 NEEDS.

13 NOW, YOUR HONOR, I THINK, QUITE RIGHTLY
14 BROUGHT UP A POINT DURING QUESTIONING OF DEFENSE COUNSEL
15 THAT YOU NEED TO BE COGNIZANT OF NOT ONLY WHAT IS THE
16 EFFECT OF THIS CASE, BUT WHAT WOULD THE EFFECT OF THAT BE
17 IF YOU WERE TO HOLD THAT IT WAS ADEQUATE TO STATE A
18 CLAIM, BECAUSE AS WE KNOW, OF COURSE, THIS IS NOT THE
19 ONLY CASE COMING OUT OF RIVERS OR OUT OF ANY PRISON THAT
20 THIS COURT SEES.

21 AND I THINK THAT THE COURT CAN BE FAIRLY
22 SECURE THAT THIS IS NOT TO THE EXTENT THERE IS A
23 FLOODGATES ARGUMENT APPLIED, FROM WHAT I AM READING, THAT
24 IS NOT THE CASE FOR WHAT THIS PARTICULAR PLAINTIFF HAS
25 ALLEGED HERE FOR THE FOLLOWING REASONS.

1 FIRST OF ALL, THE VAST MAJORITY OF THE CASES
2 THAT THE COURT SEES COMING ACROSS THIS DOCKET ARE
3 BUSINESS CLAIMS FOR DAMAGES. THIS IS NOT A BUSINESS
4 CLAIM FOR DAMAGES. IT'S A CLAIM FOR INJUNCTIVE RELIEF
5 ONLY. WE HAVE LIMITED THE REMEDIES TO EQUITABLE
6 REMEDIES. THAT, OF COURSE, IS CERTAINLY ONE DISTINCTION.
7 AND MOREOVER, THE LEVEL OF KNOWLEDGE ALLEGED IN OUR
8 COMPLAINT, I THINK, IS QUITE DIFFERENT FROM CASES WHERE
9 PRISONERS ARE SAYING I WAS TAKEN TO MEDICAL INFIRMARY, I
10 RECEIVED HORRIBLE, TERRIBLE CARE, IT VIOLATES MY EIGHTH
11 AMENDMENT RIGHTS.

12 PERHAPS THE COURT CAN REASONABLY CONCLUDE THAT
13 THE BOP, BASED ON THOSE ALLEGATIONS, COULD NOT -- YOU
14 COULD NOT REASONABLY INFER THAT THE BOP WOULD BE ON
15 NOTICE OF THAT, WHATEVER HAPPENS BEHIND THE CURTAIN IN
16 THE INFIRMARY, BUT THAT IS NOT WHAT WE HAVE ALLEGED. WE
17 HAVE ALLEGED SYSTEMIC, LONG-STANDING, ONGOING OPEN AND
18 NOTORIOUS VIOLATIONS OVER A PERIOD OF YEARS. AND IT
19 SIMPLY CANNOT REASONABLY BE INFERRRED THAT THE BOP WOULD
20 HAVE BEEN IGNORANT OF WHAT WAS GOING ON BASED ON THE
21 ALLEGATIONS IN THIS COMPLAINT.

22 NOW, I WOULD ADD THAT IF THIS CASE GOES
23 FORWARD AND IF A CLASS IS CERTIFIED, OF COURSE, THIS CASE
24 WILL ALSO BECOME THE VEHICLE FOR WHATEVER INJUNCTIVE
25 REMEDIES ULTIMATELY MAY BE ENTERED OR MAY NOT BE ENTERED

1 BY THE COURT.

2 SO I THINK THAT TO THE EXTENT WE HAVE HEARD A
3 HINT OR IMPLICATION THAT THERE IS A FLOODGATES CONCERN
4 WITH THIS DIRECT CLAIM, I DON'T THINK THAT IS THE CASE
5 BASED ON THE ALLEGATIONS IN THIS COMPLAINT.

6 LET ME TURN NOW TO GEO. I THINK, AS WE ALL
7 KNOW, THERE ARE THREE CASES THAT ARE GOING TO GOVERN THE
8 DECISION IN THIS CASE, AS IN -- AS IT HAS BEEN BRIEFED BY
9 ALL THE PARTIES, AND THOSE THREE CASES ARE WEST
10 AGAINST ATKINS, THE MALESKO CASE, AND OF COURSE THE HOLLY
11 CASE. AND I THINK IN ORDER TO UNDERSTAND OUR CLAIM AND
12 HOW WE HAVE TEED IT UP, IT'S IMPORTANT TO SEE HOW WE
13 BELIEVE THOSE THREE CASES FIT TOGETHER.

14 THE WEST CASE, OF COURSE, WAS THE FIRST OF
15 THOSE THREE CASES, AN EIGHTH AMENDMENT CLAIM AGAINST A
16 PRIVATE DOCTOR. AND THE COURT HELD THAT THAT CLAIM COULD
17 PROCEED UNDER THE EIGHTH AMENDMENT ON THE RATIONALE THAT
18 YOUR HONOR IS CERTAINLY WELL FAMILIAR WITH.

19 WE BELIEVE THAT PERHAPS IN OTHER PARTS OF THE
20 COUNTRY THE WEST CASE WOULD CONTROL THE OUTCOME OF THIS
21 CASE, BUT THAT CLEARLY IS NOT THE CASE IN THIS CIRCUIT.

22 SO WE TURN TO THE MALESKO CASE. AND WE SHOULD
23 JUST ADD THAT THE WEST CASE, THERE WERE EIGHT JUSTICES
24 THAT VOTED FOR THAT. JUSTICE SCALIA CONCURRED. SO AT
25 LEAST AT THE TIME THAT OCCURRED, THAT WAS NOT A

1 CONTROVERSIAL ISSUE.

2 THE SECOND CASE, OF COURSE, IS THE MALESKO
3 CASE, AN OPINION OFFERED BY CHIEF JUSTICE REHNQUIST, AN
4 EIGHTH AMENDMENT CLAIM AGAINST ONE OF GEO'S COMPETITORS.
5 THAT WAS A BIVENS ACTION FOR DAMAGES, AS YOUR HONOR IS
6 WELL AWARE, AND THE COURT HELD THAT A PRISONER CANNOT
7 MAINTAIN A BIVENS ACTION FOR DAMAGES AGAINST A PRIVATE
8 PRISON OPERATOR THAT CONTRACTS WITH THE BUREAU OF
9 PRISONS.

10 AND WE HAVE ACKNOWLEDGED IN OUR BRIEF THAT
11 THAT CASE FORECLOSES THE BIVENS CLAIM AGAINST GEO. WE
12 HAVE NOT ASSERTED ONE. IT'S NOT BEFORE THE COURT. BUT
13 WE HAVE POINTED OUT THAT THE CHIEF JUSTICE, IN EXPLAINING
14 THE RATIONALE FOR HIS RULING, WENT ON TO WRITE, (QUOTE)
15 "UNLIKE THE BIVENS REMEDY WHICH WE HAVE NEVER CONSIDERED
16 A PROPER VEHICLE FOR ALTERING AN ENTITY'S POLICY,
17 INJUNCTIVE RELIEF HAS LONG BEEN RECOGNIZED AS THE PROPER
18 MEANS FOR PREVENTING ENTITIES FROM ACTING
19 UNCONSTITUTIONALLY."

20 NOW, YOU CAN TRY TO DISTINGUISH THAT.

21 THE COURT: HOW DO YOU DEAL WITH THE FACT THAT
22 IN HOLLY, MR. HOLLY SOUGHT DAMAGES AND INJUNCTIVE RELIEF.
23 HIS PRAYER FOR RELIEF IN THAT CASE SAID I WANT AN
24 INJUNCTION MOVING ME OUT OF RIVERS TO A FEDERAL
25 CORRECTIONAL INSTITUTE WITH A COMPETENT MEDICAL STAFF.

1 THAT WAS ESSENTIALLY WHAT HE SAID.

2 HOW DO YOU DEAL WITH HOLLY? OR MORE
3 PARTICULARLY, HOW WOULD YOU PROPOSE THIS COURT WHICH IS
4 BOUND BY HOLLY DEAL WITH HOLLY?

5 MR. RIDINGS: I THINK THAT IS MORE THAN A FAIR
6 QUESTION. I THINK I PAID VERY CLOSE ATTENTION TO THAT
7 QUESTION FROM YOUR HONOR BECAUSE IT'S A VERY GOOD ONE AND
8 A VERY TOUGH ONE, AND I THINK THERE ARE TWO ANSWERS TO
9 IT.

10 THE FIRST ONE IS I AM NOT CERTAIN AT THE TIME
11 THE FOURTH CIRCUIT ISSUED ITS DECISION WHETHER MR. HOLLY
12 WAS STILL INCARCERATED AT RIVERS. I WOULD WANT TO GO
13 BACK AND SEE WHETHER OR NOT, IN FACT, HE HAD A LIVE CLAIM
14 FOR INJUNCTIVE RELIEF AT THAT TIME, BECAUSE HE MAY NOT
15 HAVE.

16 AND WHETHER HE DID NOT OR NOT, HOWEVER, IT
17 CERTAINLY IS SIGNIFICANT THAT THE FOURTH CIRCUIT DIDN'T
18 ADDRESS THAT ISSUE.

19 YOU ARE NOT BOUND BY RULINGS FROM A FOURTH
20 CIRCUIT ON INJUNCTIVE RELIEF AGAINST GEO. NOW, WE CAN --
21 IT'S A TOUGH CASE FOR US, THERE IS NO QUESTION ABOUT
22 THAT. BUT WE BELIEVE THAT THESE FACTS -- AND THIS IS A
23 VERY CAREFULLY PLEADED COMPLAINT AS YOUR HONOR I HOPE
24 APPRECIATES -- WE BELIEVE WE HAVE DONE PRECISELY WHAT
25 JUSTICE REHNQUIST IN MALESKO AND THE TWO JUDGES WHO WERE

1 IN THE MAJORITY IN THE HOLLY DECISION HAVE SAID IS THE
2 PROPER WAY TO ADDRESS THIS TYPE OF SITUATION, BECAUSE
3 REMEMBER IN THE HOLLY CASE, THIS IS HOW THE ISSUE IN THAT
4 CASE WAS STATED (QUOTE) "WHETHER INDIVIDUAL EMPLOYEES OF
5 A PRIVATELY OPERATED PRISON FACE EIGHTH AMENDMENT
6 LIABILITY UNDER BIVENS". THAT IS ON THE FIRST PAGE OF
7 THE DECISION.

8 SO TO THE EXTENT THAT WE WANT TO READ AND
9 INFER THINGS BEYOND THE FOUR CORNERS OF THE DECISION, AS
10 WE ALL DO AS LAWYERS, I THINK TO THE EXTENT THAT WE ARE
11 LOOKING FOR WHAT IS THE HOLDING, WHAT DID THEY HOLD IN
12 THAT CASE? THEY HELD THAT EMPLOYEES OF GEO AT THE RIVERS
13 FACILITY ARE NOT LIABLE, INDIVIDUAL EMPLOYEES.

14 THE COURT: WHY DID THEY HOLD THAT?

15 MR. RIDINGS: I AM SORRY.

16 THE COURT: WHY DID THEY HOLD THAT?

17 MR. RIDINGS: WHY DID THEY HOLD THAT?

18 THE COURT: DOESN'T THAT THEN GET US BACK TO
19 UPHOLD THE PUBLIC FUNCTION THEORY. I MEAN, I AGREE AND I
20 UNDERSTAND AS ADVOCATES THE CASE IS AGAINST YOU. I AM
21 GOING TO READ IT NARROWLY. THE OTHER SIDE IS GOING TO
22 READ IT BROADLY. I AM TRYING TO READ IT FAIRLY. AND SO
23 I AM TRYING TO -- AND, OF COURSE, I AM BOUND BY IT.

24 MR. RIDINGS: I APPRECIATE THAT.

25 THE COURT: AND SO I AM TRYING TO UNDERSTAND,

1 WASN'T THE CRUX OF WHY THE COURT, THE MAJORITY HELD THAT
2 BECAUSE IT CONCLUDED AS IT READ THE SUPREME COURT CASES
3 THAT GEO WAS NOT A GOVERNMENT ACTOR AND COULDN'T BE
4 LIABLE UNDER THE EIGHTH AMENDMENT?

5 MR. RIDINGS: NO, THAT IS NOT WHAT IT HELD.
6 THE ISSUE BEFORE THE COURT WAS WHETHER THOSE INDIVIDUAL
7 EMPLOYEES WERE SUBJECT TO THE BIVENS ACTION. SO TO THE
8 EXTENT THAT THERE IS A GOVERNMENT ACTION HOLDING IN
9 HOLLY, THAT HOLDING APPLIES TO THOSE EMPLOYEES.
10 CERTAINLY I BELIEVE THAT IS HOW I READ THE CASE.

11 AND I THINK YOU CAN SEE THE REASONING. YOU
12 KNOW, THE GOVERNMENT CONTRACTS WITH GEO. GEO THEN HAS
13 CONTRACTS WITH ANOTHER ENTITY, AND THEN MAYBE THEY HAVE A
14 CONTRACT WITH A THIRD ENTITY, A FOURTH AND FIFTH, AND
15 WHERE DOES IT END? YOU KNOW, THERE, I THINK, THERE
16 PROBABLY IS NO LIMITING PRINCIPLE, BUT THAT WAS QUITE
17 DIFFERENT. REMEMBER WHERE THIS ALL STARTED WAS WITH
18 WEST.

19 IN THE CASE OF WEST, YOU HAD A CONTRACT
20 DIRECTLY BETWEEN THE GOVERNMENT ENTITY AND THE SERVICE
21 PROVIDER, AND SO THAT PUTS GEO, FRANKLY, ON THE SAME
22 FOOTING AT LEAST AS WITH RESPECT TO THE CONTRACTUAL
23 RELATIONSHIP AS THE PHYSICIAN IN WEST WAS WITH THE STATE.

24 NOW, I WILL ANTICIPATE THE ARGUMENT THAT WAS A
25 SECTION 1983 CASE, IT WAS A STATE ENTITY AND NOT A

1 FEDERAL ENTITY, BUT TO THE EXTENT WE ARE THINKING, YOU
2 KNOW, HOW DO YOU APPROACH THE ISSUE OF GOVERNMENT
3 KNOWLEDGE AND WHERE ARE THE LIMITS? YOU KNOW, PERHAPS
4 ONE COULD FAIRLY READ THAT DECISION AS EXTENDING TO GEO,
5 THE CORPORATE ENTITY, BUT THAT CERTAINLY WAS NOT THE
6 SPECIFIC ISSUE BEFORE THE COURT.

7 SO THAT IS THE BASIS ON WHICH WE DISTINGUISH
8 IT. AND IT'S NOT JUST US MAKING THAT UP BECAUSE
9 SOMETHING SIMILAR WAS ON THE MINDS OF NINE JUSTICES IN
10 WEST WHEN THEY REACHED A SIMILAR CONCLUSION WITH RESPECT
11 TO THIS KEY POSITION.

12 WE HAVE EXPLAINED IN OUR BRIEF THE REASONS WE
13 BELIEVE, LEAVING THE STATE ACTION ASIDE, WHY WE THINK
14 HOLLY DOESN'T GOVERN. THE DEFENDANT IS DIFFERENT, THE
15 REMEDY IS DIFFERENT, AND SO FORTH.

16 SO WE THINK THAT THOSE THREE CASES ADD UP TO
17 THE FOLLOWING: PRIVATE PRISON COMPANIES LIKE GEO ARE NOT
18 SUBJECT TO BIVENS CLAIMS -- THAT IS STRAIGHT OUT OF WEST.
19 EMPLOYEES OF PRIVATE PRISONS ARE NOT SUBJECT TO BIVENS
20 CLAIMS FOR DAMAGES EITHER, AT LEAST IN THIS CIRCUIT.
21 THAT IS THE HOLDING IN HOLLY.

22 IN APPROPRIATE CIRCUMSTANCES, HOWEVER, A
23 PRIVATE CONTRACTOR IN THE SERVICE OF A GOVERNMENT ENTITY
24 MAY BE CONSIDERED PERFORMING A PUBLIC FUNCTION SUFFICIENT
25 TO SUBJECT THEM TO AN EIGHTH AMENDMENT CLAIM, AND THAT IS

1 WEST. WEST IS STILL THERE. IT HAS TO MEAN SOMETHING.

2 THE SUPREME COURT IN MALESKO -- AND AS WE -- I
3 SAID A MOMENT AGO, SAID THAT INJUNCTIVE RELIEF HAS LONG
4 BEEN RECOGNIZED AS THE PROPER MEANS FOR PREVENTING
5 ENTITIES FROM ACTING UNCONSTITUTIONALLY. THAT HAS TO
6 MEAN SOMETHING. THERE HAS TO BE AN INJUNCTIVE RELIEF
7 CLAIM IN THERE SOMEWHERE, AND WE SUBMIT THAT WE HAVE
8 FRAMED THIS IN THE WAY THAT WAS CONTEMPLATED BY THOSE
9 CASES.

10 AND THE FOURTH CIRCUIT, LET'S NOT FORGET THAT
11 AT THE END OF DECISION, EXPLAINING, IN FACT, IN A
12 LIMITING PARAGRAPH OF THEIR DECISION WHERE THEY WERE
13 SAYING WHAT IT DOESN'T APPLY TO, THEY DISTINGUISH BETWEEN
14 CLAIMS BROUGHT AGAINST GEO EMPLOYEES ON THE ONE HAND AND
15 (QUOTE) "INDEPENDENT CONTRACTORS IN THE SERVICE OF THE
16 FEDERAL GOVERNMENT". (CLOSED QUOTE) THAT HAS TO MEAN
17 SOMETHING.

18 AND WE SUBMIT THAT WHAT IT MEANS IS THAT FOR
19 THE VERY NARROW CHANNEL THAT WE HAVE DRIVEN THROUGH HERE
20 AND INJUNCTIVE CLAIM AGAINST GEO, THAT STATES AN EIGHTH
21 AMENDMENT CLAIM UNDER CONTROLLING PRECEDENT, INCLUDING
22 HOLLY.

23 I WOULD ADD, YOUR HONOR, TO THE EXTENT YOUR
24 HONOR REALLY WANTS TO LOOK BEHIND AND GET INTO THE
25 RATIONALE THAT MOTIVATED THOSE DECISIONS, ONE OF THEM, OF

1 COURSE, WAS A DESIRE TO AVOID INCONSISTENT REMEDIES, AND
2 YOU HAVE READ THOSE CASES, AND ONE OF THE REASONS THEY
3 DIDN'T WANT TO GIVE A BIVENS CLAIM IS BECAUSE IT GIVES
4 GEO'S RIVERS PRISONERS AN EXTRA BITE AT THE APPLE THAT
5 FEDERAL PRISONERS WON'T HAVE. THAT CONCERN IS NOT
6 PRESENT IN OUR CASE.

7 ALL WE ARE ASKING FOR IS THAT PRISONERS IN A
8 PRIVATE FACILITY BE ABLE TO BRING INJUNCTIVE CLAIM
9 AGAINST THEIR CAPTOR IN THE SAME WAY THAT IF HE HAD BEEN
10 A PRISONER IN A BUREAU OF PRISONS FACILITY COULD.
11 BECAUSE AT THE END OF THE DAY, WHAT, IS REALLY HAPPENING
12 HERE, THE ISSUE THAT IS REALLY IN FRONT OF YOUR HONOR IS
13 IN THIS CASE HAS SQUARELY PRESENTED, I SUBMIT, IS WHETHER
14 FEDERAL PRISONERS REALLY DO HAVE MORE RIGHTS IF THEY ARE
15 IN A BOP FACILITY THAN THEY DO IF THEY ARE IN A PRIVATE
16 FACILITY.

17 THAT IS REALLY WHAT IS AT THE HEART OF THIS
18 CLAIM, AND WE SUBMIT THAT THE ONLY WAY THAT CAN BE
19 EQUALIZED IS TO RECOGNIZE AND ACKNOWLEDGE AN INJUNCTIVE
20 REMEDY AGAINST GEO ON THE GROUNDS THAT I HAVE STATED.

21 BEFORE I CLOSE, LET ME JUST ACKNOWLEDGE -- AND
22 I WAS EXPECTING --

23 THE COURT: CLOSE ARE THAT CLAIM?

24 MR. RIDINGS: ON THAT CLAIM.

25 THE COURT: I KNOW YOU WANT TO TAKE A FEW

1 SHOTS AT THE REHAB, I AM SURE.

2 MR. RIDINGS: CLOSING ON THE EIGHTH AMENDMENT
3 CLAIM, I THOUGHT I MIGHT HEAR SOMETHING ABOUT THIS DURING
4 THE ORIGINAL PRESENTATION. GEO ACTUALLY ACKNOWLEDGES IN
5 ITS OPENING BRIEF THAT THIS REMEDY IS AVAILABLE. AND ON
6 PAGE 7 OF THE BRIEF, THEY CITE (QUOTE) "PRISONERS IN
7 PRIVATELY OPERATED FACILITIES HAVE THE ABILITY TO SEEK
8 INJUNCTIVE RELIEF IN FEDERAL COURT". THAT IS ON PAGE 7
9 OF THEIR BRIEF.

10 AND THEY SORT OF RETREAT FROM THAT LITTLE BIT.
11 THE BOP ACTUALLY MAKES THE ARGUMENT, THE COUNTER ARGUMENT
12 IN ITS PAPERS FOR DERIVATIVE LIABILITY PURPOSES, BUT THAT
13 IS A CONCESSION THAT IS IN THE RECORD AND IT'S IN THEIR
14 BRIEF, AND THAT IS PRECISELY WHAT WE HAVE DONE HERE.

15 AND I WILL JUST POINT OUT, YOUR HONOR, THAT
16 WHEN GEO RECENTLY FILED PAPERS, MR. COLLINS, YOU WILL
17 RECALL, WAS ONE OF THE NAMED PLAINTIFFS. HE IS NO LONGER
18 A NAMED PLAINTIFF. HE HAS A PRIVATE CASE. IT HAS BEEN
19 REMOVED. YOU KNOW THAT VERY WELL.

20 WHEN THEY REMOVED THAT STATE LAW CLAIM, THEY
21 INVOKED AS A GROUND OF REMOVAL 28 U.S.C. 1442. MAY I
22 HAND THIS UP TO YOUR HONOR? I PROVIDED A COPY TO THE
23 COUNSEL.

24 THE COURT: SURE. YOU MAY.

25 MR. RIDINGS: IT'S IN YOUR RECORD, BUT I HAVE

1 A COPY.

2 THE COURT: THAT IS FINE. YOU CAN HAND IT UP.

3 MR. RIDINGS: AND IF YOUR HONOR WOULD TURN TO
4 ABOUT THE FOURTH OR FIFTH PAGE OF THIS DOCUMENT WHICH IS
5 THE SECOND PAGE OF THE PETITION FOR REMOVAL, PARAGRAPH 6,
6 GEO HAS ASSERTED THAT THE UNITED STATES DISTRICT COURT
7 HAS JURISDICTION OVER THIS MATTER PURSUANT TO 28 U.S.C.
8 1442. AND THAT, OF COURSE, IS THE FEDERAL OFFICER OR THE
9 AGENCY REMOVAL STATUTE.

10 THE COURT: DOES YOUR ARGUMENT ABOUT COLLINS
11 DEPEND ON MY ACCEPTING GEO'S ARGUMENT. I HAVEN'T RULED
12 ON THIS YET, BUT I KNOW IT'S IN FRONT OF ME.

13 MR. RIDINGS: NO, SIR.

14 THE COURT: OR ARE YOU JUST TRYING TO SORT OF
15 PROVE THE POINT THAT A MINDLESS CONSISTENCY IS THE
16 HOBOGLIN OF LITTLE MINDS AND THAT GEO, AS ADVOCATES, IS
17 NOT PARTICULARLY CONSISTENT IN THE POSITIONS IT TAKES.

18 MR. RIDINGS: I THINK CERTAINLY I AM NOT
19 MAKING ANY COMMENT ON THE COLLINS CASE. I WANT TO MAKE
20 THAT CLEAR. I AM SAYING -- AND I AM NOT CRITICIZING
21 GEO'S COUNSEL IN ANY WAY, YOUR HONOR.

22 I AM SIMPLY SAYING THAT WHAT GEO SEEKS TO DO
23 THROUGH THESE CASES IS ON THE ONE HAND ACCEPT THE
24 BENEFITS OF ITS FEDERAL OFFICER AND AGENCY STATUS WHILE
25 AVOIDING THE BURDENS, AND WE SIMPLY SUBMIT YOU HAVE GOT

1 TO -- YOU EITHER ARE OR YOU AREN'T. YOU HAVE ALLEGED TO
2 THIS COURT THAT YOU ARE, AND IF YOU ARE FOR ONE PURPOSE,
3 YOU OUGHT TO BE FOR ANOTHER PURPOSE, TOO.

4 THE COURT: OKAY.

5 MR. RIDINGS: UNLESS THERE ARE FURTHER
6 QUESTIONS, I WILL MOVE ON TO THE REHAB ACT CLAIM, YOUR
7 HONOR.

8 LET ME BEGIN BY SAYING, YOUR HONOR, THAT WE
9 ESSENTIALLY HAVE TWO BRANCHES OF THE REHAB ACT CLAIM.
10 ONE IS THAT -- THE ACCESSIBILITY ISSUE. IT'S -- YOU ARE
11 VERY FAMILIAR WITH THOSE CLAIMS. THE OTHER IS ONE THAT
12 IS TIED TO MEDICAL CARE WHICH IS EITHER PREDOMINANTLY OR
13 IN SOME PLACES -- AND THIS IS IMPORTANT, I THINK --
14 UNIQUELY DELIVERED TO PERSONS WITH DISABILITIES. AND THE
15 FEDERAL DEFENDANTS HAVE ACKNOWLEDGED THAT AT LEAST WITH
16 RESPECT TO STATING A CLAIM, THEY HAVE A NUMBER OF
17 DEFENSES, BUT AT LEAST WITH RESPECT TO STATING THAT TYPE
18 OF CLAIM, THE ACCESSIBILITY ONE PASSES MUSTER.

19 WE BELIEVE THAT THE MEDICAL CARE BRANCH ALSO
20 PASSES MUSTER UNDER THE TEST THAT WAS AT LEAST SUGGESTED.
21 I DON'T WANT TO OVERSTATE IT IN THAT IT'S IN THE CHOATE
22 DECISION WHICH SAYS JUST BECAUSE SOMETHING IMPACTS
23 DISABLED PEOPLE DIFFERENTLY, THAT DOESN'T MEAN THERE IS A
24 CLAIM. YOU CAN'T SAY 20 PERCENT OF THESE FOLKS ARE
25 AFFECTED AND 4 PERCENT OF THOSE FOLKS ARE. IT'S

1 DIFFERENT; THEREFORE, THERE IS A CLAIM.

2 WE BELIEVE, YOUR HONOR, AND WE HAVE ARGUED AND
3 ALLEGED THAT WHEN YOU ARE TALKING ABOUT THINGS LIKE
4 TAKING DISABLED PEOPLE'S ORTHOPAEDIC DEVICES AWAY FROM
5 THEM, THEY COME TO THE FACILITY BECAUSE THEY ARE THE
6 WRONG COLOR OR BECAUSE THEY DON'T LIKE THEM AND NOT
7 REPLACING THEM, THAT IS PRETTY GOOD EVIDENCE OF SOMETHING
8 THAT IS INTENTIONALLY DIRECTED AT THE DISABLED PEOPLE.

9 NOW, WE CAN GO BACK AND FORTH ON WHETHER SOME
10 OF THE OTHER THINGS LIKE PHYSICAL THERAPY, I THINK THAT
11 IS A CLOSER CALL, BECAUSE THERE MAY BE PEOPLE WHO ARE NOT
12 ABSOLUTELY -- THERE MAY BE PEOPLE WHO FALL SHORT OF THE
13 DEFINITION OF A PERSON WITH A DISABILITY WHO NONE THE
14 LESS REQUIRE PHYSICAL THERAPY, SO THERE I WILL
15 ACKNOWLEDGE THAT THERE MAY BE SITUATIONS WHERE IT TOUCHES
16 BOTH CATEGORIES, DISABLED AND NON-DISABLED.

17 BUT CERTAINLY EVEN IN THAT CASE, THE VAST VAST
18 MAJORITY OF THOSE FOLKS ARE DISABLED. AND IN OUR CASE,
19 WE HAVE ALLEGED THEY ALL ARE, SO YOU DON'T REALLY NEED TO
20 REACH THE ISSUE OF PARSING BETWEEN WHAT IS AND WHAT IS
21 NOT A VIABLE REHAB ACT CLAIM ON THAT GROUND.

22 LET ME FIRST BEGIN WITH GEO. THIS IS A GEO
23 FACILITY. THE REHAB ACT APPLIES TO PRISONS.

24 THE COURT: WELL, I KNOW YOU CITED JESKI.
25 THAT IS A STATE PRISON.

1 MR. RIDINGS: CORRECT.

2 THE COURT: YOU CITED A SIXTH CIRCUIT CASE
3 THAT TALKS GENERALLY ABOUT PRISON, BUT THAT WAS A STATE
4 PRISON; RIGHT?

5 MR. RIDINGS: CORRECT.

6 THE COURT: AND, OF COURSE, THAT DOESN'T GET
7 YOU ACROSS THE LINE. I MEAN, THOSE CASES, I KNOW YOU
8 CITED THEM AND I HAVE READ THEM AND I AM VERY FAMILIAR WITH
9 THEM, BUT GO TO THE TEXT AND PONDER AND REFLECT ON THE
10 HISTORY AND STRUCTURE OF THE REHAB ACT IN 1973, THE 1978
11 AMENDMENTS, THE AMENDMENTS IN 1988, AND TELL ME WHY THE
12 LINE FOR PRIVATE ACTOR LIABILITY, THE TOUCHSTONE FOR THAT
13 IS -- IS OR IS NOT THE RECEIPT OF FEDERAL FINANCIAL
14 ASSISTANCE, AND TO SAY, AT LEAST SO FAR YOU HAVEN'T
15 PLEADED THAT THEY ARE, RECEIVING FEDERAL FINANCIAL
16 ASSISTANCE, DOESN'T THAT MEAN YOUR CLAIM AGAINST GEO
17 FAILS?

18 MR. RIDINGS: NO, BECAUSE AS WE HAVE BRIEFED,
19 YOU KNOW, THERE ARE TWO BRANCHES, AS THE COURT IS AWARE,
20 THE FEDERAL FINANCIAL ASSISTANCE BRANCH AND THE PROGRAM
21 ACTIVITY OF AN EXECUTIVE AGENCY BRANCH, AND WE HAVE, AS
22 YOU SAID, SQUARELY HUNG OUR HAT ON THE SECOND OF THOSE.

23 WE HAVE LOOKED AT THE CASES ON THE OTHERS AND
24 THEY DEAL WITH SUBSIDY, AND THIS IS A PROCUREMENT
25 CONTRACT.

1 THE PROVISION OF MEDICAL CARE TO FEDERAL
2 PRISONERS IN FEDERAL CUSTODY WHO MAY HAPPEN TO BE HOUSED
3 AT A BOP PRISON, MAY HAPPEN TO BE HOUSED AT A PRIVATE
4 PRISON, WE BELIEVE, IS IMMATERIAL, AT LEAST FOR PURPOSES
5 OF THE THRESHOLD DETERMINATION OF WHETHER THAT PROGRAM OR
6 ACTIVITY IS CONDUCTED BY A FEDERAL AGENCY OR EXECUTIVE
7 BRANCH AGENCY.

8 THE COURT: BY AN EXECUTIVE AGENCY.

9 IT DOESN'T REACH THE LEGISLATURE.

10 MR. RIDINGS: YES, EXECUTIVE AGENCY. SO WE
11 BELIEVE THE TEST FOCUSES REALLY ON WHAT IS THE PROGRAM OR
12 ACTIVITY OR SERVICE. IT'S THE PROVISION OF MEDICAL CARE
13 OR THE PROVISION OF ACCESSIBLE SERVICES OF FEDERAL
14 PRISONERS IN FEDERAL CUSTODY. THAT IS WHAT THE PROGRAM
15 OR ACTIVITY IS, AND THAT --

16 THE COURT: BUT DOESN'T THAT -- BUT DOESN'T
17 THAT SWEEP IN EVERY CONTRACT, EVERY FEDERAL PROCUREMENT
18 CONTRACT FOR SERVICES?

19 I UNDERSTAND THE ARGUMENT, BUT I AM TRYING TO
20 UNDERSTAND HOW WE ARE -- WELL, THE ORIGINAL ACT WAS
21 ENACTED IN 1973. THE AMENDMENT THAT YOU ARE RELYING ON
22 IS IN 1978. IN THE 30 YEARS SINCE, I AM LOOKING FOR SOME
23 CASES THAT ACCEPT THIS NOTION OF APPLYING THAT TO A
24 PRIVATE CONTRACTOR, BECAUSE AGAIN, IT'S DIFFERENT.

25 YOU ARE TALKING ABOUT GEO NOW, AND I

1 UNDERSTAND THAT THE BOP, IN THEIR ARGUMENT, AND IT IS
2 NOVEL, AT LEAST WHEN ONE SEARCHES FOR CASES, TO EXTEND
3 LIABILITY TO A PRIVATE CONTRACTOR AND WHAT IS THE
4 LIMITING PRINCIPLE, OR IS IT THAT EVERYONE HAS BEEN
5 MISSING IT FOR 30 YEARS, THAT EVERYONE IN THE NATION HAS
6 BEEN MISSING THIS INTERPRETATION AND THAT, IN FACT, EVERY
7 GOVERNMENT CONTRACTOR WHO PROVIDES A SERVICE IS ACTUALLY
8 PROVIDING SOMETHING THAT SUBJECTS TO IT LIABILITY UNDER
9 THE REHAB ACT?

10 MR. RIDINGS: WE DO NOT BELIEVE THAT THIS
11 SPEAKS IN EVERY FEDERAL --

12 THE COURT: WHY NOT? WHAT IS THE LIMITING
13 PRINCIPLE?

14 MR. RIDINGS: THE LIMITING PRINCIPLE IS THAT
15 IT IS THE NATURE OF THE PEOPLE WHO ARE SERVED AND IT'S
16 THE VIRTUALLY UNIQUE NATURE OF THE CUSTODIAL RELATIONSHIP
17 BETWEEN THE FEDERAL GOVERNMENT AND FEDERAL PRISONERS.
18 BECAUSE THE FEDERAL GOVERNMENT --

19 THE COURT: HOW DO YOU TEASE THAT OUT OF THE
20 TEXT? AGAIN, LOOKING -- I UNDERSTAND, AND IF YOU WERE A
21 LEGISLATOR, AGAIN, I UNDERSTAND IF SOMEONE WERE -- BUT I
22 AM DEALING WITH THE ACT THAT CONGRESS PASSED, AND I AM
23 TRYING TO UNDERSTAND FROM THE TEXT OF IT WHERE DO YOU GET
24 THAT LIMITING PRINCIPLE.

25 I MEAN, I UNDERSTAND THE -- YOUR ACTUAL

1 ARGUMENT, BUT I AM TRYING TO UNDERSTAND FROM THE TEXT AND
2 THE STRUCTURE AND THEN EVEN THE IMPLEMENTING REGS, WHERE
3 DO YOU GET THAT LIMITING PRINCIPLE?

4 MR. RIDINGS: THE COMMENTS THAT YOUR HONOR
5 MADE ABOUT THERE NOT BEING A LOT OF GUIDING CASE LAW I
6 THINK IS EXACTLY CORRECT. PARTICULARLY IN THIS AREA
7 WHERE THE RISE OF PRIVATE PRISONS, ALTHOUGH APPARENTLY
8 ONE EXISTED AT SOME POINT IN ANCIENT ENGLAND, IS A
9 RELATIVELY NEW PHENOMENON, AND SO CERTAINLY AT LEAST
10 UNTIL RECENT YEARS IN PRISON CONTEXT THIS ISSUE WOULD NOT
11 HAVE ARISEN.

12 TO RESPOND TO YOUR HONOR'S QUESTION, IT IS A
13 HARD QUESTION, BUT ALL I HAVE IS THE LANGUAGE. HERE IS
14 WHAT I HAVE. I HAVE THE LANGUAGE OF THE LAW THAT TALKS
15 ABOUT PROGRAMS OR ACTIVITIES CONDUCTED BY AN EXECUTIVE
16 AGENCY ON THE ONE HAND. I HAVE THE RIGHTS THAT PRISONERS
17 IN FEDERAL PRISONS HAVE TO BE FREE FROM DISCRIMINATION ON
18 THE BASIS OF A DISABILITY.

19 WE HAVE THE GEO CONTRACT IN WHICH GEO, BY
20 CONTRACT, HAS AN ILLEGAL INSTRUMENT, UNDERTAKES TO COMPLY
21 WITH CERTAIN OBLIGATIONS INCLUDING THE REHABILITATION
22 ACT, AND WE HAVE THE UNIQUE -- I SUBMIT IT IS UNIQUE -- I
23 DON'T THINK THAT IT'S AN OVERSTATEMENT TO SAY THAT THE
24 CUSTODIAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT
25 WHICH STRIPS PEOPLE OF THEIR LIBERTY INTERESTS AND TAKES

1 RESPONSIBILITY FOR KEEPING THEM ALIVE, THAT THE RIGHTS
2 THAT THOSE PEOPLE HAVE BY FEDERAL LAW DO NOT DISAPPEAR
3 IF -- BECAUSE SOME BUREAUCRAT IN WASHINGTON SIGNS A FORM,
4 THEY HAPPEN TO BE TRANSFERRED FROM A FEDERAL CORRECTIONAL
5 FACILITY TO A CONTRACT FACILITY.

6 NOW, IF YOUR HONOR GOES WITH US ON STATE
7 ACTION, MAYBE THIS BECOMES A WHOLE LOT EASIER BECAUSE GEO
8 ACTUALLY IS A FEDERAL ACTOR, BUT WE DON'T NEED THAT. AND
9 I THINK THAT IS THE BEST EXPLANATION THAT I CAN GIVE YOU.

10 THE COURT: WHAT DO YOU HAVE TO SAY ABOUT THE
11 BOP?

12 MR. RIDINGS: BOP. WELL, BEGINNING WITH THEM,
13 THE CUSTODIAL RESPONSIBILITY BEGINS WITH THEM AND IT ENDS
14 WITH THEM. THESE ARE FEDERAL PRISONERS IN FEDERAL
15 CUSTODY. THEY HAPPEN TO BE LOCATED FOR A TIME AT THE GEO
16 FACILITY.

17 THE COURT: WHAT ABOUT JUDGE BREYER'S OPINION
18 IN CONNECTION WITH THE APA AND THIS WHOLE IMPLYING OF A
19 PRIVATE RIGHT OF ACTION AGAINST THE GOVERNMENT. I MEAN,
20 I THOUGHT HIS OPINION WAS VERY THOUGHTFUL, AND IN SAYING,
21 YOU KNOW, LET'S KIND OF THINK ABOUT PRIVATE RIGHTS OF
22 ACTION IN GENERAL AND THEN LET'S THINK ABOUT HOW THAT
23 CONCEPT EVEN RELATES TO THE GOVERNMENT, AND THEN LET'S
24 THINK ABOUT THE APA.

25 MR. RIDINGS: IT'S ANOTHER HARD QUESTION AND

1 THE GROUND HAS SHIFTED FROM THE TIME OF CANNON TO THE
2 TIME OF SANDOVAL TO TODAY. I ACKNOWLEDGE THAT.

3 I THINK THE BOP'S ARGUMENT GETS A WHOLE LOT
4 STRONGER IF, AS THE BOP ALLEGES, THERE IS A REHAB ACT
5 CLAIM AGAINST GEO.

6 AND, IN FACT, IF THERE IS -- I THINK IT'S A
7 VERY HARD QUESTION TO ANSWER IF WE DO, IN FACT, HAVE A
8 REHAB ACT CLAIM AGAINST GEO -- WHICH I BELIEVE WE DO --
9 I COULD MAKE THE ARGUMENT THAT -- THAT THIS IS A BENEFIT,
10 THAT WHILE THERE IS NOT AN EXPRESSED REMEDY OR AN
11 EXPRESSED RIGHT OF ACTION, THAT THE RIGHT OF THE BENEFIT
12 OF THE UTTERLY MEANINGLESS IF THERE WAS NOT AN ABILITY TO
13 ENFORCE IT THROUGH A PRIVATE RIGHT OF ACTION.

14 BUT IF THERE IS AN ALTERNATIVE REMEDY AGAINST
15 GEO, I THINK THAT IS A VERY DIFFICULT ARGUMENT FOR US TO
16 MAKE.

17 I WOULD LIKE TO STATE A CLAIM AGAINST BOTH OF
18 THEM, BUT HONESTLY, AT THE END OF THE DAY, THEY ARE
19 POINTING FINGERS AT EACH OTHER ON THIS ONE, AND I AM NOT
20 ABSOLUTELY CONVINCED WHICH ONE IS RIGHT, BUT I AM PRETTY
21 SURE ONE OF THEM IS RIGHT.

22 THE COURT: WHAT IF I DON'T THINK EITHER OF
23 THEM IS RIGHT? THAT IS WHAT I WANT TO HEAR. I WANT TO
24 HEAR YOUR BEST ARGUMENT AS TO IF I DON'T THINK EITHER OF
25 THEM IS RIGHT, WHAT IS YOUR BEST ARGUMENT FOR ONE, WHY

1 THE COURT AS TO THE BOP, SHOULD IMPLY A PRIVATE RIGHT OF
2 ACTION AS OPPOSED TO SAYING, ONE, THE TOUCHSTONE UNDER
3 THE REHAB ACT FOR PRIVATE ACTOR LIABILITY IS THIS CONCEPT
4 OF RECEIPT OF FEDERAL FINANCIAL ASSISTANCE.

5 I MEAN, IT'S FROM THE ACT. YOU READ THE
6 LEGISLATIVE HISTORY. YOU READ THE IMPLEMENTING REGS, SO
7 THAT IF GEO IS NOT -- AND I AM STILL THINKING ABOUT THIS
8 CASE -- AND I APPRECIATE HOW MUCH TIME EACH SIDE HAS PUT
9 IN, AND YOU ALL HAVE BRIEFED THIS VERY WELL -- AND, BUT
10 IF GEO IS NOT LIABLE, AND WHAT IS YOUR BEST RESPONSE TO
11 THE ARGUMENT -- WELL, I MEAN, REALLY, I GUESS THERE ARE
12 TWO ARGUMENTS THAT THE GOVERNMENT CITES, THE JERSEY
13 HEIGHTS CASE, I THINK THE FOURTH CIRCUIT CASE, THE TITLE
14 VI CASE, AND THEN THEY CITE SANDOVAL AND ALSO THE JUDGE
15 BREYER'S FIRST CIRCUIT OPINION.

16 I MEAN, WHAT DO YOU HAVE TO SAY ABOUT THOSE
17 CASES AS TO THE BOP, ASSUMING THAT THERE IS NOT AN ACTION
18 UNDER THE REHABILITATION ACT AGAINST GEO, FOR PURPOSES OF
19 JUST DISCUSSION. I KNOW THAT IT'S NOT YOUR POSITION, BUT
20 FOR DISCUSSION, WHAT IS YOUR BEST ARGUMENT FOR HOLDING
21 THAT THE -- FOR STATING A CLAIM AGAINST THE BOP UNDER THE
22 REHAB ACT?

23 MR. RIDINGS: WELL, I THINK THEN, YOUR HONOR,
24 IF THAT IS THE WAY THE ISSUE WERE FRAMED, THEN WE WOULD
25 HAVE TO ESSENTIALLY ENTERTAIN A SANDOVAL ANALYSIS AND ASK

1 THE QUESTION WHETHER CONGRESS INTENDED TO BENEFIT THESE
2 PARTICULAR INDIVIDUALS. AND THE REHAB ACT, THERE IS A
3 WHOLE LOT OF HISTORY, BOTH LEGISLATIVE AND JUDICIAL,
4 AROUND THE REHAB ACT.

5 TO THE EXTENT THAT YOUR HONOR WERE INCLINED TO
6 THINK THAT THAT WAS A DISPOSITIVE ISSUE, LET ME JUST
7 PREFACE THIS BY SAYING I WOULD LIKE TO SUBMIT -- WITH THE
8 COURT'S LEAVE, I WOULD LIKE TO SUBMIT SUPPLEMENTAL
9 BRIEFING ON THAT.

10 BUT I BELIEVE THAT OUR ARGUMENT THAT WE WOULD
11 MAKE WOULD BE THAT THERE IS A CLEARLY DEMONSTRATED INTENT
12 TO BENEFIT FOLKS WHO FALL WITHIN THAT CLASS. AND BOY, IF
13 THAT INTENT IS EVER STRONG, IT IS NEVER AS STRONG AS IT
14 IS WHEN PEOPLE ARE IN FEDERAL CUSTODY AND THEY DON'T HAVE
15 AN OPTION ABOUT GOING ANYWHERE ELSE.

16 SO TO THE EXTENT THAT THERE IS A FEDERAL
17 INTEREST AND FEDERAL RIGHTS CONFERRING LANGUAGE IN THE
18 STATUTE AND INTENTION TO CONFER A RIGHT, IT IS AT ITS
19 STRONGEST WHEN PEOPLE ARE ABSOLUTELY AT THE MERCY OF
20 THEIR CAPTORS TO --

21 THE COURT: BUT AGAIN, SORT OF GETTING BACK TO
22 THE APA, I AM SURE THAT YOU WOULD DISAGREE. I KNOW IT'S
23 NOT THE CLAIM YOU STATED, BUT I ALSO KNOW THAT YOU SAID
24 IF ANY CLAIMS ARE DISMISSED, YOU WANT AN OPPORTUNITY TO
25 REPLEAD.

1 I MEAN, DO YOU THINK -- I GATHER THAT YOU
2 DISAGREE WITH THE DEPARTMENT OF JUSTICE THAT YOU WOULDN'T
3 HAVE A VIABLE -- YOUR CLIENT WOULDN'T HAVE A VIABLE APA
4 CLAIM?

5 MR. RIDINGS: WELL, IF THAT IS THE CHANNEL WE
6 WERE STEERED DOWN, WE WOULD GO DOWN THAT CHANNEL. I
7 HAVEN'T GAMED IT OUT, BUT I CERTAINLY THINK WE WOULD. WE
8 WOULD IDENTIFY THE FINAL AGENCY ACTION. I CAN THINK OF A
9 COUPLE RIGHT NOW. I DON'T WANT TO BEGIN TO SPECULATE ON
10 THAT.

11 THE COURT: I UNDERSTAND.

12 MR. RIDINGS: I THINK SOME OF THE FINAL AGENCY
13 ACT PROBABLY OCCURRED WHEN THE RIVERS CONTRACT WAS
14 SIGNED, FRANKLY, SO I DON'T THINK WE HAVE AN ISSUE ABOUT
15 WHETHER WE HAVE A FINAL AGENCY ACTION. THAT WOULD BE A
16 DIFFERENT ANALYSIS.

17 BUT AGAIN, I MEAN, THEY HAVE MANY MANY
18 DEFENSES DEALING WITH THE APA THAT HINGE, AS YOUR HONOR
19 POINTED OUT, ON THE FACT THAT THERE IS A RELIEF AVAILABLE
20 TO GEO, SO I THINK THEIR POSITION GETS A LOT TOUGHER IF,
21 IN FACT, THE COURT HOLDS THERE IS NO REHAB ACT CLAIM THAT
22 CAN BE STATED DIRECTLY AGAINST GEO.

23 BUT, AGAIN, I THINK IF THE COURT WERE INCLINED
24 TO REQUEST SUPPLEMENTAL BRIEFING ON THAT, WE WOULD ASK
25 FOR AN OPPORTUNITY TO DO THAT.

1 THE COURT: WHAT ABOUT THE -- YOU WERE GOING
2 TO TALK ABOUT ONE MORE CLAIM.

3 MR. RIDINGS: NEGLIGENCE, YOUR HONOR. 9J IS
4 THE ONLY ARGUMENT HERE. I READ THE RULE. I READ THE
5 STATUTE. IT SAYS IT'S A CIVIL ACTION FOR DAMAGES. WE
6 ARE NOT SEEKING DAMAGES. IT'S NOT A 9J CASE.

7 IF YOUR HONOR NEEDS TO GO BEYOND THAT, WE
8 BELIEVE THERE IS AN ISSUE IN THIS CASE AS TO WHETHER
9 FEDERAL COMMON LAW OR THE COMMON LAW OF NORTH CAROLINA
10 WOULD APPLY. I DON'T INTEND TO ADDRESS THAT. I WOULD
11 SIMPLY POINT OUT THAT--

12 THE COURT: DO YOU THINK THAT IS AN ISSUE IN
13 IN CONNECTION WITH THE TORT?

14 MR. RIDINGS: NO, I THINK THE STANDARDS ARE
15 LARGEY THE SAME.

16 THE COURT: BUT YOU AGREE THAT THE NEGLIGENCE
17 CLAIM IS GOVERNED SUBSTANTIVELY BY NORTH CAROLINA LAW;
18 RIGHT?

19 I MEAN, THE INJURY OCCURRED HERE UNDER
20 SUBSTANTIVE NORTH CAROLINA LAW FROM THE NORTH CAROLINA
21 SUPREME COURT. THE -- THIS STATE'S LAW GOVERNS THAT
22 CLAIM; YOU WOULD AGREE?

23 MR. RIDINGS: LIMITING IT TO THE NEGLIGENCE
24 CLAIM, I AGREE.

25 THE COURT: RIGHT. THAT IS WHAT I MEAN, THE

1 NEGLIGENCE CLAIM; NOT THE CONTRACT.

2 MR. RIDINGS: I AGREE, YOUR HONOR. I JUST
3 WANTED TO MAKE SURE THAT DISTINCTION IS CLEAR.

4 SO IF WE ARE, IN THE WORLD OF NORTH CAROLINA
5 LAW, NORTH CAROLINA LAW, AS WE KNOW, DISTINGUISHES
6 BETWEEN MEDICAL MALPRACTICE TYPE CLAIMS ON THE ONE HAND
7 AND THERE IS A COMPLETELY SEPARATE LINE OF BODY OF LAW
8 DEALING WITH CORPORATE NEGLIGENCE IN THE SITUATION OF
9 MEDICAL INJURIES, ESSENTIALLY.

10 AND THIS ISSUE AROSE -- I THINK IT DIDN'T
11 REALLY CRYSTALLIZE UNTIL THE REPLY BRIEFS, BUT CERTAINLY
12 CASES LIKE THE ESTATE OF WATERS, 144 NORTH CAROLINA APP.
13 98, A 2001 DECISION, MAKES THIS DISTINCTION, AND CASES
14 THAT LOOK AT THE CORPORATE LANGUAGES LINE OF CASES DO NOT
15 REQUIRE 9J CERTIFICATION.

16 SO THEN THE QUESTION BECAUSE BECOMES IS THIS A
17 MEDICAL MALPRACTICE CLAIM FOR DAMAGES OR SOMETHING MORE
18 AKIN TO A CORPORATE.

19 THE COURT: WHAT DO YOU SAY TO GEO'S ARGUMENT
20 THAT WHEN YOU LOOK AT THE TEXT OF 9J AND THEN THE CROSS
21 REFERENCE TO THE TWO STATUTES, THE REFERENCE TO MEDICAL
22 MALPRACTICE ACTION AND HEALTH CARE PROVIDER, THAT THAT,
23 IN FACT, THERE IS NOT -- THAT IT WAS NOT THE LEGISLATURE,
24 THE GENERAL ASSEMBLY, THE NORTH CAROLINA GENERAL
25 ASSEMBLY, WHEN IT ENACTED 9J IN 1995 AS PART OF SOME

1 STATE TORT REFORM, THAT IN FACT IT DIDN'T SWEEP IN THAT
2 DEFINITION. WHAT DO YOU SAY TO THAT? I MEAN, THAT IS
3 THEIR ARGUMENT. WHAT DO YOU SAY TO IT?

4 MR. RIDINGS: WHAT I SAY IS THE 9J
5 CERTIFICATION SERVES THE PURPOSE OF MAKING A THRESHOLD
6 DETERMINATION ABOUT WHETHER SOMEONE'S INJURIES ARE
7 SUFFICIENT TO SATISFY THE GOVERNING TEST FOR MEDICAL
8 MALPRACTICE IN NORTH CAROLINA.

9 THE COURT: YOU DON'T THINK IT HAS TO DO WITH
10 THE STANDARD OF CARE. IT INCLUDES NOT ONLY INJURIES.
11 YOU ACTUALLY THINK IT'S JUST ABOUT INJURIES AND NOT ABOUT
12 STANDARD OF CARE AND NOT ABOUT LIMITING THE NUMBER OF
13 MEDICAL MALPRACTICE ACTIONS AND DOCTORS BEING DRAGGED IN
14 TO COURT?

15 MR. RIDINGS: LET ME ANSWER IT THIS WAY.
16 I THINK IT DOES GO TO THE STANDARD OF CARE AS WELL WITH
17 RESPECT TO SPECIFIC MEDICAL DECISIONS. I THINK THAT IS A
18 FAIR CHARACTERIZATION. BUT THAT IS NOT OUR CASE.

19 OUR CASE IS NOT DR. X SHOULD HAVE CUT RIGHT
20 WHEN HE CUT LEFT, OR HE TOOK THE RIGHT FOOT INSTEAD OF
21 THE LEFT FOOT. THAT IS NOT THIS CASE. WE HAVE TO GO
22 BACK TO THE ALLEGATIONS IN THE COMPLAINT AND WE HAVE
23 ALLEGED FOUR SPECIFIC BREAKDOWNS, ONE OF WHICH -- ONE OF
24 THE CAUSES OF WHICH WE CLAIM IS NEGLIGENCE, AND I TOUCHED
25 ON THAT AT THE VERY BEGINNING. MAYBE THAT IS A GOOD

1 PLACE FOR ME TO END BEFORE I SIT DOWN.

2 AND THOSE FOUR AREAS ARE ACCESS TO MEDICAL
3 TREATMENT. NOT WHETHER THE TREATMENT IS GOOD OR BAD.
4 WHETHER YOU CAN GET TREATMENT. IF YOU ARE SICK AND HAVE
5 CANCER AND YOU ARE ON THE VERGE OF DYING, AND YOU ARE
6 TOLD YOU CAN'T GO TO A DOCTOR, WELL, WE THINK THAT THERE
7 WAS A BREACH OF DUTY THAT WAS OWED TO THOSE PRISONERS.

8 A SECOND: STAFFING, TRAINING AND SUPERVISION.
9 NOW, A CONSEQUENCE OF POOR STAFFING, NEGLIGENT STAFFING
10 AND TRAINING AND SUPERVISION MAY BE PERSONAL INJURY. AND
11 IN FACT IT MAY BE EVIDENCE OF THE BREACH THAT WE HAVE
12 IDENTIFIED. BUT THE BREACH WE HAVE IDENTIFIED IS NOT HE
13 CUT RIGHT AND SHOULD HAVE CUT LEFT.

14 AND THE OTHER IS ACCESS TO MEDICATION AND
15 FAILURE TO TREAT INFECTIOUS DISEASES.

16 LET ME TAKE THE FOURTH, BECAUSE THAT PROBABLY
17 COMES CLOSEST TO MALPRACTICE. BUT WE HAVE NOT SAID THEY
18 SHOULD HAVE GIVEN PENICILLIN, AND INSTEAD THEY GAVE
19 BACATRIN. WE HAVE SAID THEY DIDN'T GET MEDICAL CARE.
20 THE FACT THAT THEY JUST DID NOTHING, AND THEY LET THIS
21 MRSA DISEASE, TERRIBLE, TERRIBLE INFECTIONS RUN RAMPANT,
22 AND THAT WAS A NEGLIGENT ACT THAT WAS THE BREACH.

23 AND SO TO THE EXTENT YOUR HONOR THINKS WE NEED
24 TO GO WITH A VERY VERY STRAIGHTFORWARD ARGUMENT ROOTED IN
25 THE STATUTE -- AND I READ THE STATUTE -- THAT I JUST

1 THINK THIS IS NOT A MALPRACTICE CASE BECAUSE THAT IS NOT
2 THE NEGLIGENCE THAT WE HAVE ALLEGED.

3 THE COURT: THANK YOU VERY MUCH.

4 MR. RIDINGS: MY COLLEAGUE, LAURA
5 SCHATTSCHNEIDER WILL TAKE THE OTHER ISSUE.

6 MS. SCHATTSCHNEIDER: GOOD MORNING, YOUR
7 HONOR.

8 THE COURT: GOOD MORNING.

9 MS SCHATTSCHNEIDER: I WILL COME AROUND TO THE
10 PODIUM AS WELL. AS YOUR HONOR HAS NOTED, PLAINTIFFS HAVE
11 ARGUED THAT THE THIRD PARTY BENEFICIARY CLAIM SHOULD BE
12 GOVERNED BY THE TESTS SET FORTH BY THE FOURTH CIRCUIT IN
13 THE TRIMBLE CASE.

14 THE COURT: JUST ON THE JURISDICTIONAL ISSUE,
15 IS IT YOUR POSITION THE COURT HAS JURISDICTION UNDER 28
16 U.S.C. SECTION 1367?

17 MS. SCHATTSCHNEIDER: YOUR HONOR, WE KNOW THAT
18 THE CASES HAVE DISCUSSED THE CHOICE OF LAW, THE QUESTION
19 OF WHAT LAW THIS CONTRACT SHOULD BE READ UNDER. THOSE
20 CASES HAVE ADDRESSED THAT ISSUE IN THE CONTEXT OF THE
21 JURISDICTIONAL ARGUMENT, SO IF YOU LOOK AT THE OWENS
22 VERSUS HAAS CASE OUT OF THE SECOND CIRCUIT, THE COURT
23 THERE ACKNOWLEDGES THAT THE DETERMINATION OF WHETHER THE
24 CONTRACT SHOULD BE CONSTRUED UNDER FEDERAL COMMON LAW
25 MIGHT WELL BE A JURISDICTIONAL ISSUE.

1 THE COURT: AND THE SIXTH CIRCUIT TALKED ABOUT
2 OWENS AND DIDN'T AGREE WITH OWENS AND THEN THERE IS A
3 CASE FROM THE DISTRICT OF COLUMBIA THAT RECOGNIZED THE
4 CIRCUIT SPLIT AND SAID I DON'T HAVE THE CONTRACT IN FRONT
5 OF ME, SO I DON'T HAVE TO ADDRESS THIS.

6 HOW ABOUT THIS HYPOTHETICAL? IF THIS WERE THE
7 ONLY CLAIM, IF THIS WERE THE ONLY CLAIM WHERE SOMEONE
8 SAID A PURPORTED THIRD PARTY BENEFICIARY COMES IN HERE
9 AND THEY HAVE ONE COUNT AND THEY BRING IT INTO THIS
10 COURT -- AND THERE WILL ARE A LOT OF CONTRACTORS IN THIS
11 DISTRICT -- WOULD THIS COURT HAVE JURISDICTION OVER A
12 CLAIM BY A CONTRACTOR WHO IS UNHAPPY OR BY SOMEONE WHO IS
13 UNHAPPY, A PERSON WHO IS UNHAPPY WITH THEIR HOUSE?

14 THERE IS A HOUSING CONTRACTOR AT FORT BRAGG
15 THAT WAS TO BUILD A HOUSE AND THE ROOF IS LEAKING AND
16 THEY FILE A COMPLAINT IN THIS COURT, AND THEY SAY I AM A
17 THIRD PARTY BENEFICIARY TO THIS CONTRACT BETWEEN THE
18 GOVERNMENT AND THIS CONTRACTOR. THEY WERE SUPPOSED TO
19 BUILD A HOUSE FOR ME. I AM A SOLDIER.

20 AND WOULD THIS COURT HAVE JURISDICTION OVER
21 THAT CLAIM, DO YOU THINK?

22 MS. SCHATTSCHNEIDER: YOUR HONOR, I THINK THAT
23 WOULD BE SOMETHING WE WOULD VERY MUCH WELCOME THE
24 OPPORTUNITY TO BRIEF IN SUPPLEMENTAL BRIEFING.

25 THE COURT: LET'S TALK JUST ABOUT -- DO YOU

1 THINK THAT THAT CLAIM -- WELL, LET'S JUST TALK ABOUT IT.
2 DO YOU THINK THAT THAT CLAIM IS A CLAIM ARISING UNDER
3 EITHER THE CONSTITUTION OR AN ACT OF CONGRESS? IT
4 DOESN'T SOUND LIKE IT.

5 MS. SCHATTSCHEIDER: NO, BUT IF IT DID ARISE,
6 UNDER FEDERAL LAW, THERE IS AN ARGUMENT THAT 1331 WOULD
7 APPLY.

8 THE COURT: THAT WOULD RESULT IN A LOT OF
9 LAWSUITS. BUT ALL RIGHT.

10 BUT YOUR ARGUMENT HERE IS THAT 1367 -- DON'T
11 BE CONCERNED WITH JURISDICTION ON COUNT 4 ON THE BREACH
12 OF CONTRACT CLAIM BECAUSE THERE IS CLEARLY JURISDICTION
13 UNDER 1331 ON COUNTS 1 AND 2, AND THIS ARISES OUT OF THE
14 SAME COMMON NUCLEUS OF OPERATIVE FACTS AND THE COURT HAS
15 SUPPLEMENTAL JURISDICTION OVER IT; RIGHT?

16 MS. SCHATTSCHEIDER: CORRECT.

17 THE COURT: NOW, LET'S GO TO THE ARGUMENT THAT
18 GEO MAKES THAT PLAINTIFF IS NOT AN INTENDED DIRECT
19 BENEFICIARY. I MEAN, I UNDERSTAND YOUR ARGUMENT ABOUT
20 THE THIRD CIRCUIT CASES AND WHATNOT AND WE'LL GET TO THAT
21 ARGUMENT IN A MOMENT, BUT HOW DO YOU RESPOND TO GEO'S
22 ARGUMENT?

23 I MEAN, I THINK EVERYONE AGREES IN LOOKING AT
24 TRIMBLE -- AND TRIMBLE CITES A WHOLE HOST OF FEDERAL
25 CIRCUIT PRECEDENTS --

1 MS. SCHATTSCHEIDER: THAT'S CORRECT, SIR.

2 THE COURT: AND WHEN YOU ACTUALLY LOOK AT
3 THESE CASES, FOR EXAMPLE, IF YOU LOOK AT THE FEDERAL
4 CIRCUIT HAS REJECTED THE NOTION IN DIFFERENT FACT
5 PATTERNS, HAS REJECTED THE NOTION FAIRLY UNIFORMLY THAT
6 EMPLOYEES OF A CONTRACTOR WHO HAS A CONTRACT, THERE MIGHT
7 BE A DISCUSSION.

8 THERE IS A DISCUSSION IN HERE ABOUT
9 CORRECTIONAL PERSONNEL, THAT THEY ARE NOT THIRD PARTY
10 BENEFICIARIES OF THE CONTRACT AND THEY CAN'T COME INTO
11 FEDERAL COURT AND SUE.

12 THERE ARE CASES FROM THE FEDERAL CIRCUIT THAT
13 SAY THE SHAREHOLDERS OF A CORPORATION THAT HAS A FEDERAL
14 CONTRACT ARE NOT THIRD PARTY BENEFICIARIES WHO CAN COME
15 IN AND SAY I AM A SHAREHOLDER AND SOME ACTION THE
16 GOVERNMENT HAS TAKEN IN CONNECTION WITH MY CONTRACT HAS
17 IMPACTED ME ECONOMICALLY. AND THE FEDERAL CIRCUIT HAS
18 SAID, NO, YOU ARE NOT A DIRECT BENEFICIARY UNDER OUR
19 TEST. AND IT'S A STRINGENT TEST IS WHAT THEY TALK ABOUT,
20 BUT THIS FEDERAL CIRCUIT TALKS ABOUT AND CITES THE COURT
21 CASES AND CITES ITS OWN PRECEDENT. HOW IS THIS DIFFERENT
22 THAN THOSE CASES?

23 MS. SCHATTSCHEIDER: YOUR HONOR, THIS CASE
24 INVOLVES A CONTRACT THAT SPECIFICALLY IS ABOUT THE PEOPLE
25 WHO ARE SEEKING TO ENFORCE IT.

1 THE COURT: ALL RIGHT. BUT HOW IS IT
2 DIFFERENT THAN SAY THE PEOPLE MENTIONED IN THE CONTRACT
3 INCLUDE PERSONNEL? THERE IS A CLAUSE IN THERE THAT TALKS
4 ABOUT I THINK SOMETHING TO THE EFFECT ABOUT UNIFORMS.

5 LET'S SAY SOME CORRECTIONAL OFFICER AT RIVERS
6 SAYS, YOU KNOW, GEO, THERE IS A CONTRACTUAL PROVISION
7 THAT THEY ARE SUPPOSED TO PROVIDE ME A UNIFORM OF
8 A CERTAIN QUALITY AND COLOR, AND THEY HAVEN'T. I AM
9 GOING TO FILE A LAWSUIT IN FEDERAL COURT. JUDGE, HERE I
10 AM, AND I WANT TO ENFORCE THIS AS A THIRD PARTY
11 BENEFICIARY. HOW IS THAT CLAIM DIFFERENT THAN YOUR
12 CLIENT'S CLAIM?

13 MS. SCHATTSCHNEIDER: YOUR HONOR, OUR
14 CLIENT'S CLAIM GOES TO ONE OF THE KEY MISSIONS OF THE
15 CONTRACT. IN THE --

16 THE COURT: I KNOW. BUT I AM TALKING ABOUT
17 CORRECTIONAL OFFICERS; RIGHT. THE KEY MISSION,
18 PRESUMABLY, THE KEY MISSION OF THIS CONTRACT, IS TO HOUSE
19 THE FEDERAL FELONS WHO HAVE BEEN CONVICTED OF FELONIES;
20 RIGHT? THAT IS THE KEY MISSION. THERE ARE A LOT OF
21 OTHER MISSIONS, BUT THE KEY MISSION IS TO HOUSE THE
22 FEDERAL FELONY OFFENDERS WHO HAVE BEEN FOUND GUILTY OR
23 HAVE PLEADED GUILTY AND ARE NOW SUBJECT TO FEDERAL
24 INCARCERATIONS.

25 BUT I AM TRYING TO, AGAIN, UNDERSTAND LIMITING

1 PRINCIPLES ASSOCIATED WITH THIS ARGUMENT, AND LOOKING AT
2 THE TEXT OF THE CONTRACT AND I AM TRYING TO THINK HOW, IF
3 THE PRISONERS HAVE THIS CLAIM ABOUT THE HEALTH CARE --
4 AND I UNDERSTAND AND I HAVE READ THE CONTRACT AND I HAVE
5 READ THE PROVISIONS -- WOULD IT BE YOUR POSITION THAT THE
6 GUARDS, THAT THE CORRECTIONAL OFFICERS WHO WORK FOR GEO
7 ALSO HAVE A THIRD PARTY CLAIM IF GEO FAILED TO ABIDE BY
8 TERMS IN THE CONTRACT ASSOCIATED WITH EMPLOYMENT?

9 "YES" OR "NO". WOULD THEY?

10 MS. SCHATTSCHEIDER: I WOULD HAVE TO SAY
11 "YES" AS TO CERTAIN PROVISIONS OF THE CONTRACT AT LEAST.
12 IN THE SENSE THAT --

13 THE COURT: WOULD THAT BE A THIRD PARTY CLAIM
14 THAT THOSE CORRECTIONAL OFFICIALS WOULD BE ABLE TO BRING
15 AGAINST EITHER THE UNITED STATES OR GEO?

16 MS. SCHATTSCHEIDER: NO. BECAUSE IT IS GEO
17 THAT PROMISED TO CARRY OUT THE ACTIVITIES THAT ARE LISTED
18 IN THE CONTRACT. AND BECAUSE THE FEDERAL GOVERNMENT IN
19 THE CONTRACT SPECIFICALLY DISCLAIMED THIRD PARTY
20 LIABILITY AT LEAST FOR CERTAIN THIRD PARTY CLAIMS. SO
21 THE PARTIES THEMSELVES HAVE ALLOCATED LIABILITY FOR
22 CERTAIN THIRD PARTY CLAIMS ARISING UNDER THE CONTRACT,
23 SPECIFICALLY CLAIMS ARISING DUE -- FROM LOSSES DUE TO
24 DEATH, BODILY INJURY AND PROPERTY DAMAGE.

25 THE PARTIES HAVE CONTRACTED A SCHEME OF

1 LIABILITY THAT WOULD ABSOLVE THE BOP OF BEING RESPONSIBLE
2 FOR ANY --

3 THE COURT: BUT WHAT IF WE AGREE THAT, FOR
4 EXAMPLE, THAT THE NOTION OF SOME GUARD'S UNIFORM AND GEO
5 MAKES SOME PROMISE ABOUT IT. ARE YOU SAYING THAT THAT --
6 YOU ARE SAYING THAT WOULD BE ACTIONABLE?

7 MS. SCHATTSCHNEIDER: I AM SAYING THAT -- OR
8 WE ARE SAYING THAT THERE ARE CERTAIN PROMISES MADE ON THE
9 CONTRACT THAT GO TO THE HEART OF WHAT THE CONTRACT IS
10 ABOUT. YOUR HONOR HAS SAID THAT THE CONTRACT IS ABOUT
11 IMPRISONING FEDERAL PRISONERS.

12 BUT IT'S ALSO ABOUT --

13 THE COURT: I BELIEVE I MADE AN OBSERVATION
14 ABOUT WHAT THE PRIMARY MISSION IS. I MEAN, THERE COULD
15 BE OTHER MISSIONS, BUT AGAIN, I AM TRYING TO GET SOME
16 SENSE ON THE THIRD PARTY BENEFICIARY CLAIM AS TO WHAT THE
17 LIMITING PRINCIPLE IS. AND YOU ARE SAYING ACTUALLY THAT
18 THAT -- IT SEEMS YOU ARE SAYING THAT THE, YOU KNOW, TO
19 THE EXTENT THE CORRECTIONAL OFFICERS ARE MENTIONED AND
20 THERE ARE CERTAIN REPRESENTATIONS THAT GEO MAKES ABOUT
21 THOSE OFFICERS, THAT THE OFFICERS ACTUALLY WOULD HAVE A
22 THIRD PARTY CLAIM THAT THEY COULD COME INTO FEDERAL COURT
23 AND FILE A THIRD PARTY BREACH OF CONTRACT ACTION AS A
24 THIRD PARTY BENEFICIARY AGAINST GEO; RIGHT? THAT IS WHAT
25 YOU ARE SAYING?

1 MS. SCHATTSCHNEIDER: WELL, I THINK IT WOULD
2 DEPEND ON THE NATURE OF THE PROMISES MADE IN THE
3 CONTRACT. SO, YOU KNOW, WHEREAS THE CONTRACT IS ABOUT
4 THE CUSTODY OF THE FEDERAL PRISONERS THERE, IT'S ABOUT
5 HOUSING THEM, BUT IT'S ALSO ABOUT HOUSING THEM IN A SAFE,
6 SECURE AND HUMANE MANNER. THAT IS LANGUAGE FROM THE VERY
7 OPENING PAGES OF THE CONTRACT.

8 I DON'T KNOW QUITE WHAT GUARDS' UNIFORMS WOULD
9 HAVE TO DO ABOUT WITH THAT PARTICULAR MISSION AND I ALSO
10 HAVEN'T SCRUTINIZED THE SECTIONS OF THE CONTRACT HAVING
11 TO DO WITH GUARDS' UNIFORMS, BUT I CAN TELL YOU THAT THE
12 PROVISIONS OF THE CONTRACT HAVING TO DO WITH PRISONER
13 HEALTH CARE ARE -- EXPRESS A SPECIFIC INTENT TO BENEFIT
14 THE MEN AT RIVERS.

15 THE PARTIES AGREE THAT THE PROVISION OF
16 MEDICAL SERVICES COMMENSURATE TO THE LEVEL OF CARE IN THE
17 COMMUNITY IS AN ESSENTIAL COMPONENT OF PERFORMANCE UNDER
18 THE CONTRACT. NOW, I DON'T KNOW IF YOU CAN MAKE THE
19 ARGUMENT THAT PROVISION OF GUARDS' UNIFORMS WOULD BE AN
20 ESSENTIAL COMPONENT OR UNIFORMS OF A PARTICULAR MAKE OR
21 PARTICULAR COLOR, ET CETERA. IT'S IN QUITE THE SAME WAY.
22 KEEPING IN MIND THAT I HAVEN'T PAID AS MUCH ATTENTION TO
23 THE PROVISIONS ABOUT UNIFORMS.

24 THE COURT: HOW ABOUT THIS PROVISION IN THE
25 CONTRACT? THERE IS A PROVISION IN THE CONTRACT THAT

1 STATES -- AND IT'S AT -- WELL, IT'S DOCUMENT -- DEPENDING
2 HOW YOU REFERENCE THE PAGES, IT'S DOCUMENT 50-3 ON OUR
3 CM/ECF SYSTEM, AND IT'S PAGE 20 OF 87.

4 THERE IS A PROVISION THAT TALKS ABOUT THE ROLE
5 OF CONTRACTING OFFICERS AND CONTRACTING OFFICERS
6 REPRESENTATIVES, AND CONTRACTING OFFICERS, TECHNICAL
7 REPRESENTATIVES, NOTING THAT -- AND IN THE GOVERNMENT
8 CONTRACT JARGON, I WILL JUST TELL YOU, AND IT'S IN THIS
9 CONTRACT AND I HAVE CERTAINLY SEEN IT IN OTHER CONTRACTS
10 AND OTHER PLACES -- THAT THE CONTRACTING OFFICERS OR
11 REPRESENTATIVES ARE CALLED COR'S AND THE CONTRACTING
12 OFFICER TECHNICAL REPRESENTATIVES ARE CALLED COTR'S, MAY
13 CHECK THE CONTRACTORS PERFORMANCE, AND DOCUMENTS ANY
14 NON-COMPLIANCE, BUT ONLY THE CO -- AND THE CO IS THE
15 CONTRACTING OFFICER -- MAY TAKE FORMAL ACTIONS AGAINST
16 THE CONTRACT FOR UNSATISFACTORY PERFORMANCE. ONLY THE CO
17 MAY TAKE FORMAL ACTION AGAINST THE CONTRACTOR FOR
18 UNSATISFACTORY PERFORMANCE.

19 ULTIMATELY, AT THE END OF THE DAY, THE
20 PLAINTIFF'S CLAIM IN THIS CASE IS I AM UNSATISFIED WITH
21 THE HEALTH CARE I HAVE GOTTEN AT RIVERS. I AM
22 UNSATISFIED WITH WHAT GEO IS DOING. I THINK THEY ARE
23 VIOLATING THE CONSTITUTION. I THINK THEY ARE VIOLATING
24 THE REHAB ACT. I THINK THEY ARE VIOLATING NORTH CAROLINA
25 TORT LAW. AND I THINK THAT THEY ARE BREACHING THEIR

1 CONTRACT, AND I BELIEVE I HAVE A RIGHT UNDER THIS
2 CONTRACT.

3 HOW ABOUT THAT CONTRACTUAL LANGUAGE IN
4 CONSIDERING TRIMBLE, IN CONSIDERING THE FEDERAL CIRCUIT
5 CASES. DOESN'T THAT CONTRACT LANGUAGE DOOM THIS CLAIM?
6 I MEAN, DOESN'T THAT SHOW AN INTENT THAT THERE IS ONE
7 PERSON WHO CAN, ACCORDING TO THE CONTRACT LANGUAGE, MAY
8 TAKE FORMAL ACTION AGAINST THE CONTRACTOR? THAT IS THE
9 LANGUAGE. MAY TAKE FORMAL ACTION. THIS CLAIM IS FORMAL
10 ACTION.

11 DOESN'T THIS CONTRACTUAL LANGUAGE, AT LEAST IN
12 APPLYING TRIMBLE, PRESENT A PROBLEM FOR THE PLAINTIFF AS
13 TO THIS COUNT?

14 MS. SCHATTSCHEIDER: NO, YOUR HONOR, IT DOES
15 NOT.

16 THE COURT: WHY?

17 MS. SCHATTSCHEIDER: BECAUSE THAT LANGUAGE
18 SPEAKS ONLY TO THE BOP'S RIGHT TO ENFORCE THE CONTRACT.
19 IT NEITHER PERMITS NOR FORECLOSES A THIRD PARTY'S ABILITY
20 TO ENFORCE THE CONTRACT UNDER THE TESTS SET FORTH IN
21 TRIMBLE. THE TEST THAT IS SET FORTH IN TRIMBLE SAYS
22 THIRD PARTIES MAY SUE TO ENFORCE GOVERNMENT CONTRACTS IF
23 THE CONTRACT EVIDENCES AN EXPRESSED OR IMPLIED INTENT TO
24 BENEFIT THEM.

25 THE COURT: DIRECTLY.

1 MS. SCHATTSCHEIDER: DIRECTLY. AND IT'S OUR
2 ARGUMENT HERE THAT THE LANGUAGE REGARDING THE PROVISION
3 OF HEALTH CARE SERVICES AND REGARDING GEO'S COMPLIANCE
4 WITH THE REHABILITATION ACT EVIDENCES AN INTENT TO
5 BENEFIT THE PRISONERS.

6 SO THE FACT THAT THE BOP, THE BOP CAN ONLY
7 ENFORCE THE CONTRACT THROUGH THE ACTIONS OF THE
8 CONTRACTING OFFICER IS NEITHER HERE NOR THERE. THAT HAS
9 NOTHING TO DO WITH THE THIRD PARTY'S RIGHT TO ENFORCE THE
10 CONTRACT.

11 THE COURT: BUT YOU WOULD AGREE THAT THE
12 CONTRACT LANGUAGE UNDER TRIMBLE IS TO HELP INFORM THE
13 COURT AS TO WHETHER, IN FACT, THERE IS A CLAIM; RIGHT?

14 MS. SCHATTSCHEIDER: I WOULD AGREE TO THAT.
15 BUT THE PROVISIONS OF THE CONTRACT HAVING TO DO WITH WHEN
16 AND HOW AND IN WHAT MANNER THE BOP MAY ENFORCE WHAT IT
17 PERCEIVES TO BE A BREACH OF THE CONTRACT DON'T INFORM THE
18 QUESTION OF WHETHER AND WHEN AND HOW A THIRD PARTY CAN --

19 THE COURT: SO YOU DON'T THINK THE WORD "ONLY"
20 MEANS TOO MUCH?

21 MS. SCHATTSCHEIDER: IT MEANS THAT THAT IS
22 THE ONLY AVENUE THROUGH WHICH THE BOP MAY ENFORCE THE
23 CONTRACT OR THAT IS THE ONLY AVENUE FOR WHICH THE BOP MAY
24 EXPRESS ITS DISSATISFACTION.

25 THE COURT: WELL, ACTUALLY, THE LANGUAGE IS

1 "ONLY THE CONTRACTING OFFICER MAY TAKE FORMAL ACTION
2 AGAINST THE CONTRACTOR FOR UNSATISFACTORY PERFORMANCE".
3 IT DOESN'T SAY ONLY THE CONTRACTOR OR MAYBE THIRD
4 PARTIES. AGAIN, IT SAYS WHAT IT SAYS. I UNDERSTAND YOUR
5 ARGUMENT.

6 ANYTHING ELSE ON THAT CLAIM?

7 MS. SCHATTSCHEIDER: YOUR HONOR, I THINK IT'S
8 IMPORTANT TO MAKE A DISTINCTION BETWEEN THE RIVERS
9 PRISONERS AND THE GENERAL TAXPAYERS, THE GENERAL MEMBERS
10 OF THE PUBLIC. THE CLASSIC CASES ON GOVERNMENT CONTRACTS
11 INTENDED TO BENEFIT THE PUBLIC ARE VERY DIFFERENT FROM
12 THIS ONE.

13 THE COURT: WELL, HOW DO YOU DISTINGUISH THEM
14 FROM THE SHAREHOLDERS OF A CORPORATION THAT HAS A
15 CONTRACT OR THE EMPLOYEES OF A CONTRACT WHO HAS A
16 CONTRACT?

17 I MEAN, THAT IT'S BASICALLY, HEY, I THOUGHT I
18 WAS GOING TO GET SOME MONEY. I HAVE GOT A JOB AND NOW
19 ALL OF A SUDDEN THE GOVERNMENT HAS MESSED UP THIS
20 CONTRACT AND I DON'T HAVE A JOB ANYMORE. I WANT TO COME
21 IN AND SUE AS A THIRD PARTY BENEFICIARY. AND THE FEDERAL
22 CIRCUIT IS CRYSTAL CLEAR THAT THAT IS NOT -- THAT THOSE
23 FOLKS ARE NOT THIRD PARTY BENEFICIARIES.

24 HOW ARE THESE PRISONERS DIFFERENT?

25 MS. SCHATTSCHEIDER: IF YOU LOOK AT THE

1 SHERMAN AND MONTANA DECISIONS THAT ARE CITED, THOSE
2 DECISIONS MAKE CLEAR THAT THE TRIMBLE TEST SHOULD APPLY,
3 AND IF THE TRIMBLE TEST APPLIES, THE LANGUAGE OF THE
4 CONTRACT CONFERS OF A BENEFIT UPON THESE PARTICULAR
5 INDIVIDUALS. IT DOES NOT CONFER A BENEFIT ON THE
6 TAXPAYERS AT LARGE. THIS ISN'T A CASE WHERE A CONTRACTOR
7 AGREED TO LAY A LINE OF WATER OR A WATER LINE OUT TO A
8 DEVELOPMENT AND THE HOUSES BURNED DOWN.

9 AND TO THE EXTENT THAT THIS CONTRACT IS
10 ABOUT -- CONFERS BENEFITS ON ANYONE AT ALL, IT CONFERS
11 BENEFITS ON THESE INDIVIDUALS, ON THESE PRISONERS.

12 THE COURT: OKAY. ANYTHING ELSE? THANK YOU
13 FOR YOUR ARGUMENT. AT THIS TIME, THE COURT WILL HEAR
14 FROM MS. WYER.

15 MS. WYER: YOUR HONOR, I WOULD FIRST LIKE TO
16 ADDRESS THE EIGHTH AMENDMENT ARGUMENT OF THE PLAINTIFF.

17 THE COURT: RIGHT.

18 MS. WYER: SPECIFICALLY, THE PLAINTIFF'S
19 ARGUMENT THAT THE BOP AND MR. LAPPIN CAN BE DIRECTLY
20 LIABLE IN ACCORD WITH THE SUPREME COURT'S DECISION IN
21 FARMER'S VERSUS BRENNAN, IT'S VERY IMPORTANT TO
22 UNDERSTAND THAT THE FARMER'S VERSUS BRENNAN DECISION WAS
23 SETTING FORTH A STANDARD FOR DELIBERATE INDIFFERENCE FOR
24 AN INDIVIDUAL PEOPLE. THAT IS WHY IT DECIDED THAT THERE
25 MUST BE A SUBJECTIVE STANDARD FOR INDIVIDUALS. THAT

1 SIMPLY CANNOT BE APPLIED TO --

2 THE COURT: BUT IF THE PLAINTIFF'S RESPONSE IS
3 THEY ARE SEEKING INJUNCTIVE RELIEF AND THAT THE ENTITY
4 THAT THEY WANT ENJOINED IS THE BOP AND MR. LAPPIN, IN HIS
5 OFFICIAL CAPACITY. AND IF MR. LAPPIN RETIRES, WHOEVER
6 HIS SUCCESSOR, THEY WANT THE INJUNCTION TO RUN AGAINST
7 THEM. SO, I MEAN, THERE THEY ARE ARGUING, AS I
8 UNDERSTAND MR. RIDINGS' ARGUMENT, AND AS I UNDERSTAND HIS
9 PAPERS, IS YOU CAN'T DIVORCE FARMER FROM THE RELIEF
10 PLAINTIFF IS SEEKING.

11 SO WHAT DO YOU SAY TO THAT?

12 I MEAN, THAT IS TO SAY -- ARE YOU SAYING YOU
13 CAN'T APPLY THE FARMER DELIBERATE INDIFFERENCE TEST TO AN
14 INANIMATE ENTITY BECAUSE THERE IS SOME ISSUE WITH THE
15 SUBJECTIVE COMPONENT?

16 MS. WYER: YES. THAT IS WHAT THE SUPREME
17 COURT WAS SAYING IN FARMER. AT THE TIME THAT THE SUPREME
18 COURT DECIDED FARMER, THERE WAS ALREADY A STANDARD FOR
19 ENTITY LIABILITY IN THE CITY OF CANTON VERSUS HARRIS THAT
20 TALKED ABOUT MUNICIPAL LIABILITY IN THE CASE OF -- THAT
21 WAS THE FAILURE TO TRAIN POLICE OFFICERS CASE.

22 AND SO THE CITY OF CANTON VERSUS HARRIS SET
23 FORTH THE STANDARD FOR MUNICIPAL LIABILITY WHICH
24 REQUIRES -- IT'S A TWO-STEP PROCESS FOR THAT. THERE IS
25 THE FIRST STEP OF THAT PROCESS IS THAT THERE HAS TO BE A

1 PREDICATE VIOLATION UNDERLYING THE MUNICIPAL LIABILITY.

2 FARMER CAME IN AND ADDRESSED WHAT THE STANDARD
3 WAS FOR THAT PREDICATE VIOLATION FOR THE INDIVIDUAL WHO
4 ACTUALLY COMMITTED THAT PREDICATE VIOLATION. IT WASN'T
5 TALKING ABOUT WHETHER THAT REQUIRED SOMETHING, A STANDARD
6 OF DELIBERATE INDIFFERENCE THAT TOOK INTO ACCOUNT ACTUAL
7 KNOWLEDGE ON THE PART OF THAT INDIVIDUAL.

8 THE COURT: SO IS IT YOUR POSITION THAT IF --
9 THAT SOMEHOW THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE
10 STANDARD CAN'T BE APPLIED TO THE BOP AS AN INSTITUTION BY
11 SOMEONE -- BY A PRISONER SEEKING INJUNCTIVE RELIEF?

12 MS. WYER: THE STANDARD -- IT'S A DIFFERENT
13 STANDARD.

14 THE COURT: WELL, WHATEVER THE STANDARD,
15 THOUGH. I MEAN, AGAIN, AS I UNDERSTAND MR. RIDINGS'
16 ARGUMENT IS, YOU KNOW, HE ACKNOWLEDGES, HE CITES FARMER,
17 BUT LET'S SAY FARMER ISN'T THE STANDARD.

18 LET'S SAY SOME PRISONER COMES IN AND SAYS, "I
19 AM BEING HELD IN A BOP FACILITY AND THE BOP OFFICIALS ARE
20 LINING PEOPLE UP AND SHOOTING THEM, AND MY NAME IS UP
21 TOMORROW, AND I REALLY WOULD LIKE AN INJUNCTION BECAUSE I
22 THINK THEY VIOLATED THE EIGHTH AMENDMENT AND I DON'T WANT
23 THEM TO KEEP DOING IT AND I CERTAINLY DON'T WANT TO GET
24 SHOT TOMORROW. JUDGE, PLEASE SIGN THIS INJUNCTION."

25 ARE YOU SAYING THAT A FEDERAL COURT WOULD HAVE

1 TO SAY WELL, YOU KNOW, THERE IS A SUBJECTIVE COMPONENT IN
2 FARMER, AND I JUST DON'T SEE IT. INJUNCTION DENIED. OF
3 COURSE THAT COULDN'T BE THE LAW.

4 MS. WYER: YOU WOULD STILL HAVE TO GO THROUGH
5 WITH THE TWO-STEP PROCESS IF THE PLAINTIFF WERE BRINGING
6 THE SUIT AGAINST THE BOP AND NOT THE INDIVIDUAL WHO IS
7 DOING THE SHOOTING.

8 THE COURT: IN MY HYPOTHETICAL, HE IS. HE IS
9 COMING IN AND HE IS SAYING I AM NOT REALLY SURE WHAT
10 GUARD IS SCHEDULED TOMORROW, BUT I WANT YOU TO ENJOIN THE
11 BOP. ALL RIGHT. I WANT YOU TO ENJOIN THE BOP.

12 MS. WYER: EXACTLY. EXACTLY. SO WHAT YOU
13 WOULD DO IS YOU WOULD GO THROUGH THIS TWO-STEP PROCESS AS
14 OUTLINED IN THE D.C. CIRCUIT OPINION IN BAKER. FIRST,
15 YOU WOULD LOOK AT IS THERE AN UNDERLYING PREDICATE
16 CONSTITUTIONAL VIOLATION. IS THAT GUARD -- DID THAT
17 GUARD VIOLATE THE PERSON'S RIGHTS BY SHOOTING HIM.

18 THE COURT: OKAY.

19 MS. WYER: THEN, IF YOU DECIDE YES, THAT WAS A
20 CONSTITUTIONAL VIOLATION, THEN THE NEXT STEP IS TO GO TO
21 WHETHER THE BOP HAS A POLICY OR CUSTOM OF -- IS THERE
22 SOME POLICY OR CUSTOM THAT WAS THE MOVING FORCE BEHIND
23 THAT GUARD DOING THAT.

24 IF IT WAS ONLY ONE GUARD ACTING RANDOMLY, THEN
25 HAVING THE BOP -- IT'S NOT THE BOP THAT WOULD NEED TO BE

1 ENJOINED. IT WOULD BE THAT INDIVIDUAL GUARD.

2 THE COURT: ALL RIGHT. WELL, LET'S ASSUME
3 THOUGH IN MY HYPOTHETICAL THAT IT IS THE BOP. IT IS THE
4 BOP, AND THE PERSON WHO IS COMING IN TO SEEK THE
5 INJUNCTION IN MY HYPOTHETICAL, YOU KNOW, YOU DON'T HAVE
6 TO ENJOIN THE GUARDS. YOU CAN ENJOIN THEM IF YOU WANT,
7 BUT REALLY I WANT YOU TO ENJOIN THE BOP. AND THE FIRST
8 TEST WOULD BE MET. THE FIRST STANDARD WOULD BE MET.

9 SO I AM TRYING TO UNDERSTAND -- SO IS YOUR
10 ARGUMENT TO -- YOUR ARGUMENT IN RESPONSE TO MR. RIDINGS
11 THAT THERE IS NOT DIRECT LIABILITY OF THE -- THAT THE
12 ALLEGATIONS ARE INSUFFICIENT AS TO THE BOP TO ESTABLISH
13 DIRECT LIABILITY UNDER THE CASES YOU HAVE REFERENCED? IS
14 THAT THE CRUX OF IT?

15 MS. WYER: IT'S JUST THAT THE TWO-STEP PROCESS
16 CANNOT BE FULFILLED IN THIS CASE BECAUSE THE FIRST STEP,
17 THE PREDICATE VIOLATION, IS NOT GOVERNMENT ACTION. THAT
18 IS CONTROLLED BY HOLLY.

19 SO IN THE CASE THAT WE WERE TALKING ABOUT WITH
20 THE HYPOTHETICAL WITH THE GUARD, WHEN -- BECAUSE THE
21 GUARD IS A BOP EMPLOYEE IN YOUR SCENARIO --

22 THE COURT: SO, ALL RIGHT. OKAY. I GET IT
23 NOW. I GET YOUR ARGUMENT. I UNDERSTAND IT. SO YOUR
24 ARGUMENT IS THAT ON THAT FIRST STEP THAT HOLLY CONTROLS,
25 THE FIRST STEP OF THE ARGUMENT.

1 MS. WYER: RIGHT. AND YOU CANNOT GO TO THE
2 SECOND STEP UNLESS THAT FIRST STEP -- UNLESS THERE IS
3 GOVERNMENT ACTION AT THE FIRST STEP. THAT IS WHAT BAKER
4 WAS SAYING.

5 THE COURT: OKAY. HOW ABOUT THE REHAB ACT?
6 DO YOU WANT TO ADD ANYTHING ON THAT?

7 MS. WYER: YES. WELL, FIRST OF ALL, IN REGARD
8 TO WHAT CLAIMS ARE VIABLE AS A REHAB ACT CLAIM, THE CASE
9 LAW I THINK IS CLEAR THAT MEDICAL TREATMENT IS NOT --
10 DOES NOT QUALIFY AS A CLAIM UNDER THE REHABILITATION ACT
11 BECAUSE THE ACT ONLY REQUIRES EVENHANDED TREATMENT AND
12 THERE IS NOT A DISPARATE IMPACT FOR MEDICAL CARE UNDER
13 THE REHAB ACT.

14 I THINK THAT THERE IS SOME CONFUSION ABOUT THE
15 NATURE OF THE AVAILABLE REMEDY THAT WOULD HAVE TO EXIST
16 IF THE CLAIM WAS -- IF YOUR HONOR DISMISSED THE CLAIM AS
17 IT EXISTS DIRECTLY UNDER SECTION 504 AGAINST FEDERAL
18 DEFENDANTS AND THEN WAS CONSIDERING WHETHER THERE WAS A
19 VIABLE -- WHETHER IT WOULD MAKE SENSE TO ALLOW THE
20 PLAINTIFF TO AMEND TO ASSERT AN APA CLAIM.

21 THE QUESTION OF WHETHER THERE IS A PRIVATE
22 RIGHT OF ACTION AGAINST A PRIVATE ENTITY IS REALLY
23 ALREADY WELL ESTABLISHED UNDER --

24 THE COURT: WELL, RIGHT. YOU HAVE 794A2, BUT
25 THAT WHOLE THING IN CONNECTION WITH GEO BEING ON THE

1 HOOK, I HAVE READ A LOT AND I UNDERSTAND THE ARGUMENTS,
2 AND I AM GOING TO KEEP STUDYING, BUT I CAN TELL YOU IT
3 CERTAINLY SEEMS TO ME NOW, SITTING HERE TODAY, THAT THE
4 TOUCHSTONE FOR PRIVATE SECTOR LIABILITY UNDER THE REHAB
5 ACT IS THE RECEIPT OF FEDERAL FINANCIAL ASSISTANCE, AND
6 THAT IS NOT WHERE PLAINTIFF IS HANGING HIS HAT.

7 MS. WYER: RIGHT.

8 THE COURT: BUT THAT, AGAIN, DOESN'T, YOU
9 KNOW. I WANT TO HEAR WHATEVER FINAL THOUGHTS YOU HAVE ON
10 THE REHAB ACT CLAIM AGAINST YOUR CLIENT, AND I HEARD YOU
11 EARLIER. IT WAS MY UNDERSTANDING THAT EVEN IF THE COURT
12 CONCLUDED THAT, YOU STILL TAKE THE POSITION THAT THERE IS
13 NO REHAB ACT CLAIM AGAINST -- THERE IS NO REHAB ACT CLAIM
14 IMPLIED AGAINST THE BOP.

15 YOU BELIEVE, THEORETICALLY, THERE MIGHT BE AN
16 APA CLAIM, ALTHOUGH YOU THINK THAT WOULD BE FUTILE. THAT
17 IS AN ISSUE FOR ANOTHER DAY, PERHAPS, BUT THAT
18 REGARDLESS, YOU TAKE THE POSITION, AS I UNDERSTOOD IT --
19 CORRECT ME IF I AM WRONG -- THAT EVEN IF GEO, EVEN IF
20 THERE IS NO REHAB ACT CLAIM AGAINST GEO UNDER THE
21 LANGUAGE PLAINTIFF IS RELYING ON, PROGRAM OR ACTIVITY
22 CONDUCTED BY AN EXECUTIVE AGENCY, THAT THERE IS STILL NO
23 IMPLIED PRIVATE RIGHT OF ACTION AGAINST DOJ; CORRECT?

24 MS. WYER: ABSOLUTELY, YOUR HONOR, BECAUSE
25 THERE IS NOTHING -- WHETHER THERE IS A RIGHT OF ACTION

1 AGAINST GEO OR NOT IS REALLY IRRELEVANT TO WHETHER THERE
2 IS AN IMPLIED PRIVATE RIGHT OF ACTION AGAINST THE FEDERAL
3 -- AGAINST THE BOP. THAT -- THIS WHOLE DISCUSSION ABOUT
4 WHETHER THERE IS OR IS NOT AN ALTERNATIVE REMEDY AGAINST
5 GEO IS REALLY ONLY RELEVANT TO THE APA, THE POSSIBILITY
6 OF AN APA CLAIM.

7 BUT THE IMPORTANT POINT WITH RESPECT TO AN
8 IMPLIED RIGHT OF ACTION AGAINST THE BOP IS THAT COURTS
9 JUST DISFAVOR FINDING A CONGRESSIONAL INTENT TO SET FORTH
10 A PRIVATE RIGHT OF ACTION IN AN IMPLIED MANNER DIRECTLY
11 UNDER A STATUTE WHERE THE APA ALREADY PROVIDES A
12 FRAMEWORK, AND THE FOURTH CIRCUIT'S DECISION IN MANN SET
13 FORTH THAT PRINCIPLE.

14 AN EXPRESS CAUSE OF ACTION AGAINST THE
15 GOVERNMENT IS -- REPRESENTS THE CONGRESS'S INTENT NOT TO
16 PROVIDE A CAUSE OF ACTION UNDER THE STATUTE.

17 AND SO THAT WHOLE ISSUE IS REALLY I THINK NOT
18 A VERY DIFFICULT ONE.

19 THE COURT: THANK YOU.

20 MR. NUMBERS.

21 MR. NUMBERS: DEALING WITH THE EIGHTH
22 AMENDMENT CLAIM, I THINK -- I AM 95 PERCENT SURE MR.
23 HOLLY WAS STILL IN JAIL AT THE TIME THE FOURTH CIRCUIT
24 DECISION CAME DOWN BECAUSE AS YOU MAY RECALL THERE WAS A
25 HOLLY 2 CASE THAT CAME THROUGH, AND I BELIEVE YOU WERE

1 THE JUDGE IN THAT CASE.

2 THE COURT: I WAS.

3 MR. NUMBERS: THAT ALLEGED VARIOUS THINGS
4 OCCURRING AT THE FACILITY AFTER HE INITIATED AND PURSUED
5 HOLLY, SO I BELIEVE HE WAS STILL IN THE FACILITY.

6 WE TALKED A LOT ABOUT THE APPLICABILITY OF
7 HOLLY TO GEO AS THE ENTITY. THE ISSUE IN HOLLY WAS
8 WHETHER PROVIDING HEALTH CARE TO INMATES WAS A PUBLIC
9 FUNCTION. THE COURT SAID HOLLY ARGUES, HOWEVER, THAT
10 LIABILITY EXISTS HERE BY VIRTUE OF THE FACT THAT GEO'S
11 PARTICULAR BUSINESS FUNCTION INVOLVES PRISONS AND THUS IS
12 A PUBLIC FUNCTION.

13 THEY WENT ON TO REJECT THE CLAIM SAYING THAT
14 INADEQUATE MEDICAL CARE ALLEGED IN THIS CASE
15 UNQUESTIONABLY ARISES OUT OF THE DEFENDANT'S OPERATION OF
16 A PRISON, NOT THE FACT OF HOLLY'S INCARCERATION. AND IT
17 GOES ON TO DENY ANY SORT OF RELIEF FOR EIGHTH AMENDMENT,
18 SO HOLLY COMPLETELY FORECLOSES AN EIGHTH AMENDMENT CLAIM
19 AGAINST GEO, INJUNCTIVE OR OTHERWISE.

20 WE TOUCHED ON COLLINS BRIEFLY. I KNOW WE ARE
21 NOT HERE TO DEBATE COLLINS. IT WOULD BE OUR POSITION
22 THAT THAT IS NOT INCONSISTENT BECAUSE THE FEDERAL OFFICER
23 REMOVAL STATUTE APPLIES TO BOTH GOVERNMENTAL ACTORS AND
24 PRIVATE ACTORS THAT ARE CLEARLY NOT FEDERAL ACTORS.

25 SO WE HAVE BRIEFED THAT AND THE BRIEFS ARE

1 CONSPICUOUSLY MISSING FROM THE SUBMISSION MY PLAINTIFF'S
2 COUNSEL, BUT WE'LL LEAVE THAT FOR ANOTHER DAY.

3 UNDER THE REHABILITATION ACT, THERE IS THE
4 ISSUE OF GEO'S CONTRACTUAL RESPONSIBILITY TO ADHERE TO
5 THE REHABILITATION ACT, AND OBVIOUSLY YOUR HONOR HAS SAID
6 YOU HAVE READ THE CONTRACT. THAT IS AN ISSUE BETWEEN THE
7 BOP AND GEO. IF GEO IS NOT DOING THAT, THE BOP HAS A
8 VARIETY OF REMEDIES TO ADDRESS THOSE ISSUES. SO WE WOULD
9 SAY THAT IS A NON-STARTER FOR PLAINTIFFS IN IMPOSING
10 REHABILITATION LIABILITY ACT ON GEO.

11 FOR THE NEGLIGENCE CLAIM, IN PLAINTIFF'S BRIEF
12 ON PAGE 42, THEY SAY RULE 9J APPLIES ONLY TO CLAIMS FOR
13 (QUOTE) "MEDICAL MALPRACTICE" (CLOSED QUOTE). THEN THEY
14 SAY (QUOTE) "MEDICAL MALPRACTICE" (CLOSED QUOTE) IN TURN
15 IS DEFINED AS A CIVIL ACTION FOR DAMAGES. THAT IS NOT
16 EXACTLY CORRECT.

17 THE TERM MEDICAL MALPRACTICE IS NOT
18 STATUTORILY DEFINED. THE TERM MEDICAL MALPRACTICE ACTION
19 IS. MEDICAL MALPRACTICE ACTION DOES NOT APPEAR IN 9J.
20 IT'S NOT THERE.

21 AND I WOULD ALSO POINT OUT ON THIS ISSUE, YOUR
22 HONOR HAS HAD SEVERAL CASES THAT ARE ESSENTIALLY COPYCATS
23 OF THIS CASE IN WHICH THERE HAVE BEEN REQUESTS FOR RELIEF
24 FOR MONETARY DAMAGES, INJUNCTIVE DAMAGES, AND DECLARATORY
25 RELIEF, AND IN THOSE CASES, YOUR HONOR HAS FOUND THAT 9J

1 APPLIES.

2 AND FROM A POLICY STANDPOINT, THE INJUNCTIVE
3 RELIEF COULD ACTUALLY BE MORE COSTLY TO THE MEDICAL
4 PROVIDER THAN A DAMAGES AWARD, WHICH ARE TYPICALLY
5 HANDLED BY INSURANCE CARRIERS AND THINGS LIKE THAT. IF
6 YOUR HONOR WERE FOR SOME REASON TO ENJOIN WAKE MED OR UNC
7 HOSPITAL AND PURSUE THE OVERSIGHTS IN THIS CASE, THE COST
8 WOULD BE ASTRONOMICAL AND WOULD MOST LIKELY COME DIRECTLY
9 OUT OF THE POCKET OF THE HEALTH CARE PROVIDER, OR TAKING
10 IT TO A SMALLER LEVEL --

11 THE COURT: SO YOUR ALTERNATIVE ARGUMENT IS
12 YOU CITE THE SUPREME COURT OF NORTH CAROLINA CASE
13 THAT YOU CITED IN YOUR PAPERS, AND YOU CITE THE LANGUAGE
14 OUT OF THE STATE VERSUS WATERS, AND YOU SAY EVEN IF --
15 YOUR FIRST ARGUMENT IS MEDICAL MALPRACTICE ACTION IS NOT
16 IN 9J, THEREFORE YOU OUGHT TO REJECT PLAINTIFF'S
17 ARGUMENT. LOOK AT THEIR ALLEGATIONS. THESE ARE CLAIMS
18 THAT ARE -- DEAL WITH MEDICAL MALPRACTICE ISSUES.
19 ALTERNATIVELY, EVEN IF ONE WERE TO LOOK AT THE LANGUAGE
20 IN THE DEFINITION OF MEDICAL MALPRACTICE ACTION AND ITS
21 REFERENCE TO DAMAGES, WHEN YOU GO BACK AND REFLECT ON THE
22 GENERAL ASSEMBLY'S INTENT IN 1995, THE LANGUAGE WAS
23 INSERTED THERE BECAUSE 99.9 PERCENT OF ALL MEDICAL
24 MALPRACTICE ACTIONS ARE FOR DAMAGES, AND THAT THE INTENT
25 OF THIS WAS TO HAVE A MEDICAL PROFESSIONAL REVIEW THE

1 STANDARD OF CARE BEFORE A DOCTOR OR HOSPITAL GOT DRAGGED
2 INTO COURT ON A MEDICAL MALPRACTICE.

3 MR. NUMBERS: CORRECT. IT APPLIES TO SMALLER
4 PROVIDERS AS WELL BECAUSE IT PROTECTS THOSE FOLKS.

5 THE COURT: I GOT YOUR ARGUMENT.

6 MR. NUMBERS: ON OTHER THING ABOUT THE 9J
7 ITSELF IN TERMS OF STATUTORY CONSTRUCTION, WE WOULD ARGUE
8 IT'S IMPROPER TO LOOK TO 90-21.11 IN ORDER TO DEFINE
9 COMPLAINTS OF ALLEGED MEDICAL MALPRACTICE BECAUSE THE
10 PHRASE AS DEFINED IN 90-21.11, ACCORDING TO THE RULE OF
11 THE LAST ANTECEDENT, APPLIES ONLY TO THE TERM "HEALTH
12 CARE PROVIDER".

13 JUSTICE SCALIA DISCUSSED THIS IN 2003 IN
14 BARNHART VERSUS THOMAS. THE CASE HAS BEEN CITED BY THE
15 FOURTH CIRCUIT RECENTLY. THE CITE FOR BARNHART IS 540
16 U.S. 20, 2003.

17 JUSTICE SCALIA DISCUSSED THE RULE OF THE LAST
18 ANTECEDENT AND SAID A LIMITING CLAUSE OR PHRASE SHOULD
19 ORDINARILY BE READ AS MODIFYING THE NOUN OR PHRASE THAT
20 IMMEDIATELY FOLLOWS, AND GAVE THE FOLLOWING, I THINK,
21 AMUSING EXAMPLE, WHERE HE SAID CONSIDER, FOR EXAMPLE, THE
22 CASE OF PARENTS WHO BEFORE LEAVING THEIR TEENAGE SON
23 ALONE IN THE HOUSE FOR THE WEEKEND, WARN HIM, (QUOTE)
24 "YOU WILL BE PUNISHED IF A THROW A PARTY OR ENGAGE IN ANY
25 OTHER ACTIVITY THAT DAMAGES THE HOUSE."

1 THE SON, NEVERTHELESS, THREW A PARTY AND IS
2 CAUGHT. HE SHOULD HARDLY BE ABLE TO AVOID PUNISHMENT BY
3 ARGUING THAT THE HOUSE WAS NOT DAMAGED.

4 AND THE SAME SORT OF THING APPLIES HERE. IT
5 SAYS COMPLAINT ALLEGING MEDICAL MALPRACTICE AGAINST A
6 HEALTH CARE PROVIDER AS DEFINED AND AS DEFINED APPLIES
7 ONLY TO HEALTH CARE PROVIDER.

8 MOVING ON TO THE BREACH OF CONTRACT ARGUMENT,
9 INTERESTING NOTE IN TRIMBLE -- AND THERE WERE A COUPLE OF
10 TRIMBLE DECISIONS, BUT I BELIEVE THE ONE THAT WE ARE
11 FOCUSING ON HERE ACKNOWLEDGES THAT --

12 THE COURT: THE FIRST TRIMBLE DECISION WAS
13 JUDGE LEE DISMISSED THE CLAIM AND SAID THIS IS ALL UNDER
14 THE CONTRACT DISPUTES ACT, AND THE FOURTH CIRCUIT
15 DISAGREED AND THEN IT CAME BACK.

16 MR. NUMBERS: WHEN IT CAME BACK DOWN, THE
17 COURT RECOGNIZED THAT THERE WAS A DISPUTE OVER THE
18 STANDARD THAT APPLIED. AND WHAT THE COURT SAID IN
19 TRIMBLE, WELL, WE DON'T REALLY NEED TO GET TO THAT
20 BECAUSE THIS FAILS ON THE FIRST PART. AND SO THERE WAS
21 NO NEED TO REALLY DETERMINE THE ISSUE BECAUSE STEP ONE
22 WAS WHETHER THERE WAS AN INTENT IN THE CONTRACT TO
23 BENEFIT THE THIRD PARTIES, THAT ISSUE APPLIES NO MATTER
24 WHETHER YOU GO ON TO THE SECOND STEP OR NOT. AND THE
25 COURT SAID, YOU FAIL ON THAT CLAIM. SO WE DON'T NEED TO

1 ADDRESS THE STICKIER ISSUE OF WHETHER STEP TWO APPLIES.

2 THE FEDERAL CIRCUIT CASES, MONTANA VERSUS
3 UNITED STATES, AND THE OTHER CASE THAT ESCAPES ME AT THIS
4 MOMENT IN TIME, IF YOU LOOK IN FOOTNOTE 6 OF MONTANA, IT
5 SAYS, "THE LIMITING RULE WE ARE APPLYING HERE DOES NOT
6 APPLY IN CASES WHERE IT'S A THIRD PARTY MEMBER OF THE
7 PUBLIC ATTEMPTING TO ENFORCE THIRD PARTY BENEFICIARY
8 RIGHTS AGAINST A GOVERNMENT CONTRACTOR."

9 SO IT ACKNOWLEDGES THAT THERE IS A DIFFERENT
10 STANDARD THAT IS APPLIED TO CASES LIKE WHAT WE ARE SEEING
11 HERE.

12 THE COURT: SO YOU EQUATE THE INMATES TO
13 MEMBERS OF THE PUBLIC?

14 MR. NUMBERS: WELL, THEY ARE MEMBERS OF THE
15 PUBLIC.

16 THE COURT: I UNDERSTAND THAT, BUT IN TERMS
17 OF -- YOU DON'T HAVE TO WIN ON THAT ARGUMENT TO WIN ON
18 THIS DISMISSING THAT CLAIM; DO YOU? OR DO YOU? DO YOU
19 BELIEVE THAT JUST UNDER THE FIRST DIRECT BENEFICIARY TEST
20 THAT THEY WOULD BE SIMILARLY SITUATED? YOU KNOW, YOU
21 LOOK AT THE CONTRACTUAL LANGUAGE AND THEY ARE NOT
22 INTENDED DIRECT BENEFICIARIES UNDER THE LANGUAGE OF THE
23 CONTRACT.

24 MR. NUMBERS: I THINK THAT THAT IS ABSOLUTELY
25 CORRECT, THAT THEY ARE NOT DIRECTLY INTENDED

1 BENEFICIARIES UNDER THE LANGUAGE OF THE CONTRACT, AND I
2 THINK WHEN YOU LOOK AT CASES LIKE THE CASE FROM D.C. THAT
3 ALSO DEALT WITH D.C. PRISONERS IN A PRIVATE FACILITY, THE
4 LANGUAGE OF THAT CONTRACT IS VERY SIMILAR, AND I BELIEVE
5 IT WAS A D.C. CIRCUIT. IT MIGHT HAVE BEEN --

6 THE COURT: IT WAS THE DISTRICT OF COLUMBIA,
7 THE COURT OF APPEALS, I THINK.

8 MR. NUMBERS: -- SAID THERE IS NO THIRD PARTY
9 BREACHING OF CONTRACT ISSUE.

10 WE HAVE TALKED ABOUT WHAT THE PURPOSE OF THE
11 CONTRACT IS. I MEAN, IT DOESN'T JUST DEAL WITH HEALTH
12 CARE. IT DEALS WITH OTHER THINGS THAT ARE IMPORTANT TO
13 INMATES IN TERMS OF THEIR INCARCERATION, MANAGEMENT OF
14 THEIR RECORDS, WHEN THEY GET OUT OF JAIL, THE SECURITY OF
15 THE FACILITY IN GENERAL, WORK AND CORRECTIONAL
16 OPPORTUNITIES, EDUCATIONAL OPPORTUNITIES, RECREATION
17 OPPORTUNITIES.

18 THESE ARE ALL THINGS THAT ARE PART AND PARCEL
19 OF LIFE AT THE FACILITY, AND IT WOULD OPEN THE FLOODGATES
20 TO ALL SORTS OF BREACH OF CONTRACT CLAIMS FOR ALL OF
21 THESE VARIOUS PROVISIONS IF THIS CLAIM WERE ALLOWED TO GO
22 FORWARD BECAUSE THIS CONTRACT DOES NOT SAY, GEO, OPEN A
23 PRISON AND RUN IT, AND WE'LL CHECK BACK WITH YOU IN FIVE
24 YEARS. THAT IS NOT THE WAY THE FEDERAL GOVERNMENT DOES
25 BUSINESS. THEY ARE GOING TO EXPLAIN WHAT IS EXPECTED OF

1 THE CONTRACTORS.

2 YOU SIMPLY CANNOT -- IT WOULD OVERWHELM THE
3 COURTS TO ALLOW BREACH OF CONTRACT ON ALL OF THESE TYPES
4 OF CLAIMS.

5 SO AS WE SAID BEFORE, WE BELIEVE OUR MOTION TO
6 DISMISS SHOULD BE GRANTED.

7 THE COURT: THANK YOU VERY MUCH. COUNSEL, I
8 AM GOING TO TAKE THIS CASE UNDER ADVISEMENT. I DO VERY
9 MUCH APPRECIATE EACH SIDES PREPARATION AND PRESENTATIONS
10 TODAY AND YOUR PAPERS.

11 IT IS ALWAYS ENJOYABLE TO PARTICIPATE IN
12 ARGUMENTS WITH VERY WELL PREPARED COUNSEL WHO HAVE DONE
13 AN EXCELLENT JOB IN BOTH BRIEFING AND IN ARGUMENT.

14 WITH THAT, WE'LL BE IN RECESS. I WILL COME
15 DOWN AND GREET COUNSEL.

16 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)

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4 CERTIFICATE
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7 THIS IS TO CERTIFY THAT THE FOREGOING
8 TRANSCRIPT OF PROCEEDINGS TAKEN IN THE UNITED STATES
9 DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF
10 THE SHORTHAND NOTES, CONSISTING OF THE WHOLE THEREOF, OF
11 THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND
12 TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

13
14 DATED THIS 31ST DAY OF JANUARY, 2010.
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17 /S/ SHARON K. KROEGER
18 COURT REPORTER
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